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A treatise on the law of easements

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C 7

A TREATISE

ON THE

LAW OF EASEMENTS.

BY

CHARLES JAMES GALE, Esq.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

THE EIGHTH EDITION

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW.

0

LONDON:

SWEET AND MAXWELL, Ltd., 3, CHANCERY LANE.

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## PREFACE

### TO THE EIGHTH EDITION.

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MORE than ten years have elapsed since the appearance of the last Edition, and there have been many important decisions upon the subject matter of this treatise during that period.

The decision in *Colls v. Home and Colonial Stores, Ltd.* and the succeeding cases has necessitated the re-writing of the chapter on Light; and the present Edition also contains considerable additions to other parts of the work.

So far as was possible consistently with retaining the now familiar and time-honoured framework of the treatise, the Editor has adhered to the system of working the new cases into the text, instead of referring to them only in the footnotes.

The Editor is conscious that the presence of brackets in the text is not free from objection to the reader. In view, however, of the great authority of the Author's text, and the number of editions in which it has been distinguished from the additions of the various Editors, the system of enclosing all such additions within square brackets has been adhered to. The notes to bracketed portions of the text are not bracketed.

Every case is dated. In a matter depending so much on case-law as the law of Easements, the date of a



decision is of great importance; and it is often necessary, in weighing conflicting dicta or decisions, to refer to the dates at which they were respectively pronounced. The date is also useful as enabling the reader to trace the several contemporary reports of the same case (*a*).

In quoting from the Law Reports from 1875 to 1890, reports of decisions of the High Court are referred to by the letters Ch. D. or Q. B. D., as the case may be; reports of decisions of the Court of Appeal, by the letters Ch. Div. or Q. B. Div. References to the Digest are distinguished by book and chapter, as well as by title, Krueger and Mommsen's edition of the "*Corpus Juris Civilis*" (Berlin, 1877) being used.

The task of editing the present Edition was originally undertaken by the Editor in collaboration with Mr. GEORGE CAVE, K.C., the editor of the last two Editions; but the latter was compelled, by press of other work, to withdraw from the undertaking. The Editor has, however, had the benefit of Mr. CAVE's assistance in certain parts of the work, including the chapter on Light, and desires to express his indebtedness to Mr. CAVE.

R. R.

9, OLD SQUARE, LINCOLN'S INN,  
February, 1908.

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(*a*) Professor Pollock, in a note to his "*Law of Torts*," gives the following direction:—"The consecutive numbers (in N. S.) of the volumes of the *Law Journal* for a given legal year may be found by subtracting thirty from the year of the century in which the legal year (Michaelmas Term to Michaelmas Term) begins. For the *Weekly Reporter*, similarly, subtract fifty-one." For the *Law Times Reports* (N. S.), of which two volumes are published every year, subtract fifty-eight, multiply the remainder by two, and search in the volume bearing the number of the product, and in the preceding volume.

## PREFACE

TO THE FIRST EDITION.



THE want of a treatise upon those important rights known in the Law of England by the name of "Easements" has, it is believed, been sensibly felt by the Profession.

The length of time which has elapsed without any attempt having been made to supply this want affords a sufficient reason for the appearance of the present Essay. The difficulties which arise from the abstruseness and refinements incident to the subject, have been increased by the comparatively small number of decided cases affording matter for defining and systematizing this branch of the law. Upon some points, indeed, there is no authority at all in the English Law;—of the decisions, some depend upon the circumstances of the particular case, and some are irreconcilable with each other.

Water-courses are the only class of Easements with regard to which the law has been settled with any degree of precision.

A desire to remedy an admitted defect led to the passing of the Prescription Act—a statute, which has not only failed in effecting its particular object, but has introduced greater doubt and confusion than existed before its enactment. In fact, had it not been held, that the statute did not repeal the Common Law, many rights which have been enjoyed immemorially would have been put an end to by circumstances which never could have been intended to have that effect.

As in many other branches of the law of England, the earlier authorities upon the law of Easements appear to be based upon the Civil Law, modified, in some degree, probably, by a recogni-

tion of customs which existed among our Norman ancestors. The most remarkable instance of an adoption by the English Law from this source is the doctrine known in the French law by the title of "*Destination du père de famille.*"

In the majority of the cases, both ancient and modern, probably from a consideration of this being the origin of the law, recourse has been had for assistance to the Civil Law. It has, therefore, been considered that the utility of the work would be increased by the introduction of many of the provisions of that refined and elaborate system with respect to Prædial Servitudes, and the doctrine of Prescription; as well as some of the observations of Pardessus—an eminent French writer on Servitudes.

With the same view the authority of decisions in the American Courts has been called in aid upon the subject of water-courses—questions which the value of water as a moving power, and the frequent absence of ancient appropriation, have often given rise to in the United States. In those judgments the law is considered with much care and research, and the rights of the parties settled with precision. The result of the authorities is stated by Chancellor Kent, in his well-known Commentaries, with his usual ability.

Upon many points, particularly upon the construction of the Prescription Act, the observations contained in the following pages are, in some degree, unsupported by direct authority. It has, however, been thought better to endeavour to open the law upon the doubts which presented themselves than to pass them over in silence.

TEMPLE,  
*July, 1839.*



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## ADDENDA.

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Page 127, note (i).—*Add to the reference to Cable v. Bryant*, [1908] 1 Ch. 259.

Pages 204, 215, 219, 223, 228.—*Add to the reference to Morgan v. Fear*, [1907] A. C. 425.

Pages 382, 384, 385, 403.—*Manchester Corporation v. New Moss Colliery, Ltd.* was affirmed on appeal to H. of L., (1908) W. N. 61.

Page 515.—*In re Brotherton's Estate* is reported, on appeal, (1908) W. N. 56.

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## CORRIGENDUM.

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Page 29, line 7.—For “lot” read “sell.”

# TREATISE

## ON THE

# LAW OF EASEMENTS.

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## PART I.

### OF EASEMENTS GENERALLY.

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## CHAPTER I.

### OF THE NATURE OF AN EASEMENT.

IN addition to the ordinary rights of property, which are determined by the boundaries of a man's own soil, the law recognizes the existence of certain rights accessorial to those general rights, to be exercised over the property of his neighbour, and therefore imposing a burthen upon him. Servitudes generally.

That branch of these accessorial rights which confers merely a convenience to be exercised over the neighbouring land, without any participation in the profit of it, is called, by the law of England, Easements, as rights of way, and [acquired] rights to the passage of light and air and water (*a*). Those accessorial rights, which are accompanied with a participation in the profits of the neighbouring soil, are called Profits à prendre, as rights of pasture, or of digging sand (*b*). Easements distinguished from profits à prendre.

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(*a*) [See the definition below, p. 8.]

(*b*) [Or of shooting or fishing. *Ewart v. Graham* (1859), 7 H. L. C. 331, affirming 11 Ex. 316; *Fitzgerald v. Firbank*, [1897] 2 Ch. 96.]

Both these classes are comprehended under the Servitudes of the civil law. In treating of prædial Servitudes, no distinction is made between rights of this nature, whether accompanied or unaccompanied by a participation in the profits of the land (c).

Dominant and  
servient tenements.

The tenement to which the right is attached is called the dominant, that on which the burthen is imposed the servient tenement. The term servitude is used to express both the right and the obligation; the term easement generally expresses the right only.

Easements  
distinguished  
from obligations  
and  
licences.

An easement differs from an obligation, inasmuch as it gives a right over the land of another, while an obligation gives a right only against the owner (d).

[An easement differs from a licence in a similar way. Both the benefit and the burden of an easement are annexed to land (e); and where, in respect of the burden, some advantage is reserved to the servient tenement, such as a rent payable by the owners of the dominant tenement, such advantage runs with the ownership in fee of the servient tenement, and may be enforced by the successors in title of the original grantor of the easement (f). A licence, on the other hand, unless coupled with a grant, is personal to both grantor and grantee (g), and neither binding on the assignee of

(c) *Inter rusticorum prædiorum servitutes quidam computari rectè putant aquæ haustum, pecoris ad aquam adpulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.*—Inst. 2, 3, § 2; [cf. Dig. 8, 3, § 1].

(d) Merlin, *Répertoire de Jurisprudence*, tit. Servitude, p. 45.

(e) *North British Railway v. Park Yard Co., Ltd.*, [1898] A. C. 643; *Hastings (Lord) v. North Eastern Rail. Co.*, [1898] 2 Ch. 674; [1899] 1 Ch. 656; affirmed sub nom. *N. E. Rail. Co. v. Hastings (Lord)*, [1900] A. C. 280.

(f) *Hastings (Lord) v. N. E. Rail. Co.*, ubi sup.

(g) Hence, a mere licensee cannot maintain in his own name an action for infringement against a stranger. *Hill v. Tupper* (1863), 2 H. & C. 121; *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Kensit v. Great Eastern Railway* (1884), L. R. 27 Ch. Div. 122; *Heap v. Hartley* (1889), L. R. 42 Ch. Div. 461. But the grantee of an exclusive right of fishing or shooting has a right

to carry away the fish or game caught or shot, and can therefore sue a stranger. *Fitzgerald v. Firkbank*, [1897] 2 Ch. 96; *Radcliffe v. Hayes*, [1907] 1 Ir. R. 101. See 1 Smith. L. C. ed. 11, p. 345. As has been already stated, the subject of such a grant is a profit à prendre, and confers an interest in the land. Hence, too, a licence is not within the Statute of Frauds, s. 4, so as to require a written instrument for its creation. *Jones v. Flint* (1839), 10 A. & E. 753; 50 R. R. 527; *Wright v. Stavert* (1860), 2 E. & E. 721. Nor is the licensee rateable to the relief of the poor as an occupier of land. *Watkins v. Overseers of Milton* (1868), L. R. 3 Q. B. 350; *Reg. v. St. Pancras Assessment Committee* (1877), 1. R. 2 Q. B. D. 581; cf. *Cory v. Bristol* (1877), L. R. 2 App. Cas. 262; *Smith v. Lambeth Assessment Commissioners* (1882), L. R. 10 Q. B. Div. 327; *Taylor v. Overseers of Pendleton* (1887), L. R. 19 Q. B. D. 238. Cf. on the subject of the note, *Pym v. Harrison* (1876), 33 L. T. 796. As to revoking a licence, see below, p. 31.

[the licensor (*h*) nor generally assignable by the licensee (*i*). "A dispensation or licence properly passes no interest, nor alters or transfers property in any thing, but only makes an action lawful which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer killed and tree cut down, they are grants" (*k*).]

There are many rights which in their mode of enjoyment partake of the character of easements; such as a custom for the inhabitants of a vill to dance upon a particular close [at all times of the year (*l*); a custom for the inhabitants of a parish to play at all kinds of lawful games in a close at all seasonable times of the year (*m*); a custom for the freemen and citizens of a town, on a particular day in the year, to enter upon a close and have horse races thereon (*n*); a custom that every inhabitant of a town shall have a way over such and such land either to the church or to market (*o*); a right to use a strip of land as a promenade (*p*);] a custom for liege subjects exercising the trade of a victualler to

Easements distinguished from customary rights in the nature of easements.

(*h*) *Wallis v. Harrison* (1838), 4 M. & W. 538; 51 R. R. 715 (licence to make and use wayleave held not binding on assignee of licensor); *Roffey v. Henderson* (1851), 17 Q. B. 574; 85 R. R. 671 (licence by landlord to tenant to remove fixtures after expiration of tenant's term, held not binding on a subsequent lessee without notice); *Coleman v. Foster* (1856), 1 H. & N. 37 (licence to enter a theatre held to be determined by an assignment of the theatre); *Richards v. Harper* (1866), L. R. 1 Exch. 199 (licence to let down surface). Cf. *Pemsel & Wilson v. Tucker*, [1907] 2 Ch. 191. See, as to a licence coupled with a grant, *Brooke*, Abr. art. Trespass, pl. 400; 7 Bac. Abr. p. 676, art. Trespass, F. 1.

(*i*) See *Muskett v. Hill* (1839), 5 Bing. N. C. 694; 50 R. R. 832; *Mitcalfe v. Westaway* (1864), 34 L. J. C. P. 43.

(*k*) *Thomas v. Sorrell* (1679), Vaugh. 351; quoted by Tindal, C. J., in *Muskett v. Hill*, ubi sup. Cf. as to sales of

growing crops, *Parker v. Staniland* (1809), 11 East, 362; 10 R. R. 521; *Crosby v. Wadsworth* (1805), 6 East, 602; 8 R. R. 566; *Evans v. Roberts* (1826), 5 B. & C. 829; 29 R. R. 421; *Carrington v. Roots* (1837), 2 M. & W. 248; *Sainsbury v. Matthews* (1838), 4 M. & W. 343; *Jones v. Flint*, ubi sup.

(*l*) *Abbot v. Weekly* (1677), 1 Lev. 176; cf. *Hall v. Nottingham* (1875), L. R. 1 Ex. D. 1.

(*m*) *Fitch v. Rawling* (1795), 2 H. Bl. 393; 3 R. R. 425. As to what are seasonable times, see *Bell v. Wardell* (1740), Willes, 202. A customary right claimed for the inhabitants of several adjoining parishes was held bad in *Edwards v. Jenkins*, [1896] 1 Ch. 308.

(*n*) *Mounsey v. Ismay* (1865), 1 H. & C. 729; 3 H. & C. 486.

(*o*) *Gateward's Case* (1607), 6 Coke, Rep. 59; *Brocklebank v. Thompson*, [1903] 2 Ch. 344.

(*p*) *Abercromby v. Fermoy*, [1900] 1 Ir. R. 302.

Easements  
distinguished  
from  
customary  
rights.

erect booths on the waste of a manor at the time of fairs (*q*) ; a custom for the inhabitants of a township to go to a close and take water from a spring (*r*) [a custom to moor vessels in a navigable tidal estuary of the river Thames (*s*) ; a custom to deposit oysters dredged from an oyster fishery upon the foreshore in another part of the fishery (*t*) ; a custom for all the inhabitants of a parish, being fishermen, to dry their nets on a particular close adjoining the sea and the property of a private owner (*u*) ; a custom for the burgesses and inhabitants of a burgh (in Scotland) to use a strip of ground for the purposes of recreation and amusement and the bleaching and drying of clothes (*x*).] As, however, the existence and validity of these rights [generally] depend upon some local custom excluding the operation of the general rules of law (*consuetudo tollit communem legem*) (*y*), and they are sometimes entirely independent of any express or implied agreement between the parties, they generally stand upon a different footing, and are not in all respects governed by the same principles as those which determine the boundaries of private easements.

When claims of this kind are unreasonable in their character, they are disallowed, even in cases where they might possibly have formed the subject of a valid grant (*z*). But no question of a

(*q*) *Tyson v. Smith* (1837), 6 A. & E. 745 ; 9 A. & E. 406. [Cf. *Chaplin v. Bettsworth* (1690), 3 Lev. 190.]

(*r*) *Race v. Ward* (1855), 4 E. & B. 702 ; 24 L. J. Q. B. 153. [See also 7 Vin. Abr., Customs, p. 178 ; and *Harrop v. Hirst* (1868), L. R. 4 Exch. 43. A parish council cannot in their own name, without the Attorney-General, maintain an action to enforce a right of the inhabitants of the parish to the use of a spring. *Stoke Parish Council v. Price*, [1899] 2 Ch. 277. There cannot be a customary right for the public to take water from a well. *Dungarvan Guardians v. Mansfield*, [1897] 1 Ir. R. 420.]

(*s*) *Att.-Gen. v. Wright*, [1897] 2 Q. B. 318.

(*t*) *Corporation of Truro v. Rowe*, [1901] 2 K. B. 870.

(*u*) *Meyer v. Denne*, [1904] 2 Ch. 534 ; [1905] 2 Ch. 538.

(*x*) *Montgomerie & Co., Ltd. v. Wallace-James*, [1904] A. O. 73.

(*y*) *Le Case de Tanistry*, Davys, 31 (b),

32 (a) : Co. Litt. 33 b, 113 b ; 1 Rolle, Abr. Custom, C. 558. Vide per Curiam in *Tyson v. Smith* (1838), 9 A. & E. at p. 421 ; 48 R. R. 539. [*Earl of Coventry v. Willes* (1863), 9 L. T. N. S. 384 ; and *Bourke v. Davis* (1889), L. R. 44 Ch. D. 110.]

(*z*) "Every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom: for that ought to be reasonable and ex certa causâ rationabili (as Littleton saith) usitata, but need not be intended to have a lawful beginning ; as custom to have land devisable, or of the nature of gavelkind or borough-English &c. These and the like customs are reasonable, but by common intendment they cannot have a lawful beginning by no grant or act or agreement but only by parliament." *Gateward's Case* (1607), 6 Rep. 59. The context shows that the statement applies to the minor local customs as well as to those given as instances. Cf. the judgment of the Lord Chancellor in *Dyce v. Lady James Hay*,

similar kind can arise in the case of a private easement, involving only the rights of the owner of the dominant tenement on the one hand and the servient on the other; for in such a case if the circumstances are such that the right claimed could have been the subject-matter of a valid grant as an easement, its existence may be established by proof of user, and no valid objection can be taken on the ground of the extent to which it may interfere with the enjoyment of the servient tenement.

Easements distinguished from customary rights.

[The reader will observe hereafter that this work treats also of certain rights which exist as ordinary incidents of property, such as the right of support for the soil in its natural state, and the right of a riparian owner to the flow of a stream in its natural course. The similarity of such "natural" rights to those mentioned above, which have their origin in express or implied grants, is pointed out and their nature explained in the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse* (a); and it has been determined that such rights exist at common law, wholly independent of any conveyance by one owner to another (b).

Easements distinguished from common law rights in the nature of easements.

The classification of some of the incidents of the complete enjoyment of land as natural rights on the one hand, and easements

1 Macqueen, Sc. App. 305, and the judgment of the Exchequer Chamber in *Tyson v. Smith*, ubi sup.; [*Millichamp v. Johnson* (1746), Willes, 205, n.; *Blewitt v. Tregonning* (1835), 3 A. & E. 554; 42 R. R. 463; Preface, vi; *Mounsey v. Ismay* (1853), 1 H. & C. 729; 3 H. & C. 486; *Blackett v. Bradley* (1862), 1 B. & S. 940; 31 L. J. Q. B. 65; *Souerby v. Coleman* (1867), L. R. 2 Exch. 96; *Warrick v. Queen's College* (1870), L. R. 10 Eq. 105; *Hall v. Nottingham* (1875), L. R. 1 Ex. D. 1; *Mercer v. Denne*, [1904] 2 Ch. 534; [1905] 2 Ch. 538.

In *Marquis of Salisbury v. Gladstone* (1861), 9 H. L. C. 692 (a case of copyhold custom), Lord Cranworth said: "In truth I believe that, when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient

times on the party setting up the custom." But it seems possible to keep the fiction of a right conferred out of the question, and to recognize the existence of local laws subject to a common law rule as to reasonableness. If Lord Cranworth's interpretation of the rule were the right one, the rule should also apply to private easements. See per Jessel, M. R., in *Hammerton v. Honey* (1876), 24 W. R. 603.

The rule was considered in *Goodman v. Mayor of Saltash* (1882), L. R. 7 App. Cas. 633, where the appellant's claim was affirmed, not as a servitude, but as a trust or condition qualifying the title of the respondents. And cf. *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188.

(a) (1859), E. B. & E. p. 654; affirmed on error, 9 H. L. C. 503.

(b) See below, Part II. Chap. II. Sects. 1 and 4, and the observations of Wood, V.-C., in *North Eastern Rail. Co. v. Elliot* (1860), 1 J. & H. 145; substantially affirmed, 10 H. L. C. 333. Cf. *Kensit v. Great Eastern Rail. Co.* (1884), L. R. 27 Ch. Div. 122, at p. 133;



Easements  
distinguished  
from  
common law  
rights.

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[on the other, has been made by the law somewhat arbitrarily. Thus, the right of riparian owners to the flow of a natural stream is a natural right of property (c); no easement need be acquired for the full enjoyment of this right; it exists by virtue of the ownership of the land, in the same way as does the right to graze cattle, or to make any other legal use of a man's own tenement. In the same way the right to the support of land unencumbered by buildings exists as a natural right of property inherent in the land (d). The right to light, however, which might appear to be logically indistinguishable from the above, as a right derived direct from Nature without the intervention of any human effort, stands, in the eye of the law, upon a totally different footing (e). No natural right exists to a single ray of light, except in so far as, the ownership of land being deemed to extend even to the heavens, it is not possible for a man's land to be actually roofed in against his will. The maxim "Cujus est solum ejus est usque ad celum" can hardly be advanced as the reason for the distinction which exists, for example, between the right of the owner of land to receive light and his right to receive lateral support; for the maxim continues "et ad inferos." In some of the American States this maxim is, with greater consistency, adopted in its entirety; the right to support stands upon the same footing in this respect as the right to light, there being no natural right to either; indeed, so jealously is the maxim applied, that rights to support or light, which would infringe upon it, may not even be acquired by prescription (f).

Easement  
is valuable  
property;  
and a defect  
in title.

In the eye of the law an easement is valuable property; and consequently where land was agreed to be sold with a super-added easement, and a title could not be made to the easement except under a lease for ninety-nine years, it was held that the vendor could not make a title to the property agreed to be sold (g). But a contract for the sale of a house, with windows overlooking property of a third person, implies no warranty that those windows are entitled to an easement of light over such adjoining

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and *Angus v. Dalton* (1878), L. R. 4 Q. B. Div. at p. 191, per Brett, L. J., and 6 A. C. at p. 752, per Field, J.

(c) Post, Part III. Chap. I.

(d) Post, Part III. Chap. IV.

(e) Ibid. Chap. II.

(f) See post, Part III. Chap. IV. sect. (2) at end.

(g) *Wright v. Howard* (1823), 1 Sim. & St. 190; 24 R. R. 169. Cf. *Pemsel and Wilson v. Tucker*, [1907] 2 Ch. 191.

[property, nor even that the period of prescription is running in favour of the property sold (*h*). Similarly the existence of an easement over property is a defect in the title to that property (*i*).]

Easements  
distinguished  
from  
common law  
rights.

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(*h*) *Greenhalgh v. Brindley*, [1901] 2 Ch. 324.

(*i*) *Shackleton v. Sutcliffe* (1847), 1 De G. & Sm. 609; 75 R. R. 216; *Ashburner*

*v. Sewell*, [1891] 3 Ch. 405; *In re Puckett and Smith's Contract*, [1902] 2 Ch. 258; *Turner v. Moon*, [1902] 2 Ch. 325.

## CHAPTER II.

## OF THE ESSENTIAL QUALITIES OF AN EASEMENT.

## Definition.

AN easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged "to suffer or not to do" something on his own land, for the advantage of the dominant owner (a).

## Essential qualities.

The essential qualities of easements, properly so called, may be thus distinguished :—

1st. Easements are incorporeal.

2nd. They are imposed upon corporeal property.

3rd. They confer no right to a participation in the profits arising from it (b).

4th. They must be imposed for the benefit of corporeal [or incorporeal hereditaments, and are usually imposed for the benefit of corporeal] property.

5th. There must be two distinct tenements—the dominant, to which the right belongs; and the servient, upon which the obligation is imposed (c).

6th. By the civil law, it was also required that the cause must be perpetual.

SECT. 1.—*Easements are Incorporeal.*

## Easements are incorporeal.

"A right of way, or right of passage for water, where it does not create an interest in the land, is an incorporeal right, and stands upon the same footing with other incorporeal rights" (d).

(a) *Termes de la Ley*, tit. Easements.

(b) ["Rights of accommodation as distinguished from those which are directly profitable." — *Burton*, *Comp.*

c. 6, § 3, art. 1165.]

(c) [Adopted by the Court in *Mounsey v. Ismay* (1865), 3 H. & C. 486.]

(d) *Per Curiam* in *Hewlins v. Ship-*

Considered with regard to the servient tenement, an easement is but a charge or obligation, curtailing the ordinary rights of property (e); with regard to the dominant tenement, it is a right accessorial to these ordinary rights—constituting, in both cases, a new quality impressed upon the respective heritages (f).

SECT. 2.—*Easements are imposed upon Corporeal Property, and not upon the Person of the Owner of it.*

The right conferred by an easement attaches upon the soil of the servient tenement; the utmost extent of the obligation imposed upon the owner being not to alter the state of it so as to interfere with the enjoyment of the easement by the dominant (g). Obligation of easement attaches on property.

The obligation upon him is in fact negative—to suffer or not to do—ceasing altogether upon his ceasing to be the owner of the servient heritage (h); and passing with the servient heritage, upon its transfer, to each successive proprietor (i).

*pam* (1826), 5 B. & C. 221; S. C. 7 D. & R. 783; 31 R. R. 757.

Servitutes prædiorum rusticorum, etiam si corporibus accedunt, incorporales tamen sunt.—Dig. 8, 1, 14, de serv.

[Easements, though incorporeal, are hereditaments; and as, by the Interpretation Act, 1889, s. 3, the word "land" in any Act passed since 1850 includes all hereditaments, an easement is "land" within the meaning of the Vendor and Purchaser Act, 1874. *Jones v. Watts* (1890), L. R. 43 Ch. Div. 574; and see below, Part V. Chap. I.

It has been held that a grant of a new easement is not a "conveyance of property" within the meaning of Schedule I. Part I. of the General Order under the Solicitors' Remuneration Act, 1881. *In re Sanders' Settlement*, [1896] 1 Ch. 480.

As to rateability, see *G. W. R. v. Badgworth* (1867), L. R. 2 Q. B. 251; *Holywell Union v. Halkyn Drainage Co.*, [1895] A. C. 117. As to liability for land tax, see *Metropolitan Rail. Co. v. Fowler*, [1893] A. C. 416.]

(e) Pertinent enim ad libera tenementa jura sicut et corpora, jura sive servitutes, diversis respectibus: jura autem sive libertates dici poterunt ratione tenementorum quibus debentur.—Bracton, lib. 4, fol. 220 b.

(f) Quid aliud sunt jura prædiorum quam prædia qualiter se habentia? Ut bonitas, salubritas, amplitudo.—Dig. 50,

16, 86, de v. s.

(g) *Taylor v. Whitehead* (1781), 2 Doug. 745; and see *Pomfret v. Ricroft* (1669), 1 Saund. 321; *Bullard v. Harrison* (1815), 4 M. & S. 387; 16 R. R. 493. Vide post, Incidents of Easements.

In omnibus servitutibus reflectio ad eum pertinet qui sibi servitutem asserit, non ad eum cujus res servit.—Dig. 8, 5, 6, § 2, si serv. vind.

(h) Aio esse jus, quo dominus aliquid pati in suo, aut in suo non facere, cogitur, ex naturâ omnium servitutum. Pati in suo, puta re suâ utentem, fruentem, per fundum suum euntem, agentem, aquamve ducentem, tignum in sedes suas immittentem. Non facere, veluti altius non ædificare, in suo non ponere quod luminibus ædium nostrarum aut prospectui officiat, &c. Planè enim ipsa servitus constitui non potest, ut quis aliquid cogatur facere in suo; puta viridaria aut arbores prospectûs nostri causâ tollere, aut in suo pingere, quo amœniorem nobis prospectum præstet, obligatio hæc erit, non servitus constituta; et ideo, prædio alienato, non sequetur actio novum possessorem, ut fit ubi servitus constituta est; sed in eum, qui id facere promisit, hæredemque ejus, actio in personam dabitur in id scilicet, quod interest, si non fiat quod promissum est, ut accidit in omni obligatione faciendâ.—Vinnius, ad Inst. lib. 2, tit. 3; Dig. 8, 1, 15, § 1, de serv.

(i) Non ignorabis, si priores possea-

Obligation of  
easement  
attaches on  
property.

So completely is this the case that, if any disturbance of an easement has taken place previous to a transfer of the servient heritage, although such tortious act would give a right of action against the former owner, his successor is also liable if he allows it to continue (*k*).

SECT. 3.—*Easements confer no right to a Participation in the Profits of the Servient Tenement.*

Easements  
confer no  
right to  
profits.

Easements are specifically distinguished from other incorporeal hereditaments by the absence of all right to participate in the profits of the soil charged with them.

The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common (*l*); but the right to take "something out of the soil" is a profit à prendre, and not an easement (*m*).

The servitude of the civil law had a much wider signification: comprehending, in addition to the easements proper of the English law, many rights which in it fall under the division of profits à prendre (*n*).

SECT. 4.—*Easements must be imposed for the beneficial Enjoyment of Real Property.*

Easements  
accessory to  
property.

An easement, as such, can only be claimed as accessory to a tenement. This position was recognized as law by the judges in a very early case (*o*). "Suppose," said Shars, J., "I grant to

sores, aquam duci per prædia prohibere jure non potuerint, cum eodem onere perferendæ servitutis, transire ad emptores eadem prædia posse.—Cod. 3, 34, 3, de serv. et aq.

(*k*) *Penruddock's Case* (1598), 5 Rep. 100; and post, Remedies for Disturbance.

(*l*) [Blackstone (Christian's), vol. ii. p. 18; and the judgment in *Race v. Ward* (1855), 4 E. & B. 702, in which case it was held that the right to go upon a neighbour's land and take water out of

a spring there is an easement, and not a profit à prendre.]

(*m*) *Manning v. Wardsale* (1836), 5 A. & E. 758, at p. 764; S. C. 1 Nev. & P. 172; 44 R. R. 576; *Blewett v. Tregonning* (1836), 3 A. & E. 554, at p. 575; S. C. 5 Nev. & Man. 308; 42 R. R. 463; Preface, vi; *Bailey v. Appleyard* (1838), 8 A. & E. 161; S. C. 3 Nev. & Per. 257; 47 R. R. 537; [see *Race v. Ward*, ubi sup.; *Constable v. Nicholson* (1863), 14 C. B. N. S. 230].

(*n*) Ante, p. 2, note (*c*).

(*o*) 21 Edw. 3, 2, pl. 5.

you a way over my land to a certain mill, and you are not seised of this mill at the time, but you purchase it afterwards: notwithstanding I disturb you in this way afterwards, you shall not have assize, though you may have a writ of covenant." To which it was replied, "In your case it is no marvel to me, although no assize lies, inasmuch as he had not the frank tenement to which he claimed to have (dut avoir) the way, at the time the way was granted to him, and therefore he could not have had assize if he had been disturbed at the time when the grant was made; and as he could not then have assize, the purchase of the frank tenement afterwards would not enable him to maintain this action" (p).

Easement  
accessory to  
property.

"Nullus hujusmodi servitutes," says Bracton, "constituere potest, nisi ille, qui fundum habet et tenementum; quia prædiorum, aliud liberum, aliud servituti suppositum (q).

"Et ita pertinent servitutes alicui fundo ex constitutione sive ex impositione de voluntate dominorum" (r).

[It was stated in the original text that easements must be imposed for the benefit of corporeal property, but this cannot now be considered law. It is true that there are authorities to be found stating in general terms that a thing incorporeal cannot be appurtenant to another thing incorporeal; but this, as pointed out in the notes to Co. Litt. 121 b, note 7 (Hargrave and Butler's edition), is by no means an universal rule. The true test, as there mentioned, is the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without incongruity; and this test has been judicially adopted as that which ought to be applied.

Whether  
easement can  
attach to  
incorporeal  
heredita-  
ments.

In *Hanbury v. Jenkins* (s), Buckley, J., adopting note 7 to Co. Litt. 121 b, referred to above, was prepared to hold that an incorporeal right of way along both banks of a river may be appendant to an incorporeal right of fishing.

(p) [But see *North British Rail. Co. v. Park Yard Co.*, [1898] A. C. 643; below, p. 13, note (a).]

(q) Lib. 4, f. 220 b.

(r) *Idem*, f. 221 a. Quoties nec hominum, nec prædiorum, servitutes sunt, quia nihil vicinorum interest, non valet;

veluti ne per fundum tuum eas, aut ibi consistes, et ideo si mihi concedas jus tibi non esse fundo tuo uti, frui, nihil agitur; aliter atque si concedas mihi jus tibi non esse in fundo tuo aquam quærere, minuendæ meæ aquæ gratiâ.—Dig. 8, 1, 15, de serv.

(s) [1901] 2 Ch. 401.

Whether  
easement can  
be attached to  
incorporeal  
heredita-  
ments.

[In *A.-G. v. Copeland* (*t*), a highway authority claimed an easement of discharging water on to the defendant's land by means of a pipe running from a highway. The action was dismissed by Alverstone, C. J., on the ground, so far as concerns the point now under consideration, that the public right of passage over the road (*u*) was not such a right as was capable of having the easement claimed attached to it, and that therefore the claim to the easement failed for want of a dominant tenement. This decision was reversed by the Court of Appeal, on the ground that the pipe in question was a "drain" within the meaning of sect. 67 of the Highway Act, 1835, Collins, M. R., adding "that a legal origin was possible, and ought to be presumed," for the right claimed, and the Lords Justices apparently concurring.

Applying the above-mentioned test, it is submitted that if the owner of a right to take certain minerals (*x*) under close A. obtained from the owner of an adjacent close, B., a grant of a way over the close B., or a right to discharge water over it, for him, his heirs and assigns, as appurtenant to the right of mining, an easement would undoubtedly be created and would be appurtenant to the incorporeal right already vested in the grantee.

It is clear that, if the grantee, in the case above supposed, was already the owner, not merely of the incorporeal hereditament, but of the substratum itself containing the minerals, and obtained such a grant from the owner of B., he would thus become entitled to an easement appurtenant to his soil; and what reason is there for holding that such would not also be the result in the case first put? If the question were raised in the form above suggested, the difficulty could not be evaded by holding that the first incorporeal right is enlarged by the grant of the second, and that both together form one entire right, as they would do if they had originally been conferred by the same grantor in one grant (*y*). Upon the question itself see the case of *Rowbotham v. Wilson* (*z*).]

(*t*) [1901] 2 K. B. 101. On appeal, [1902] 1 K. B. 690.

(*u*) See per Lord Cairns, L. J., *Rangeley v. Midland Rail. Co.* (1868), L. R. 3 Ch. 310; post, p. 15.

(*x*) The right to take minerals out of the soil of another is an incorporeal right; the right to a stratum of minerals is a corporeal right. *Doe v. Wood*

(1819), 2 B. & Ald. 724; 21 R. R. 469; *Wilkinson v. Proud* (1843), 11 M. & W. 33; 63 R. R. 507; *Duke of Hamilton v. Graham* (1871), L. R. 2 H. L. (Sc.) 166.

(*y*) The instance given above, with substantially the conclusions stated, was originally from the hand of Mr. Willes, a former editor.

(*z*) (1860), 8 H. L. C. 348.

Probably in the English as in the civil law, the grant of an easement in respect of a house about to be purchased, or built, by the grantee, would enure as such. [A familiar example of this is the case of a conveyance, by a landowner, of part of his land for the express purpose of building a house, in which case the land which he retains becomes affected by the easement of support for the house when built. "If the grant is made expressly to enable the grantee to build a house on the land granted, there is an implied warranty of support, subjacent and adjacent, as if the house had already existed" (a). And it would no doubt be held, in the case of a grant affecting one tenement with an easement in favour of another tenement, supposed to belong but not really belonging to the grantee at the time of the grant, that upon the grantee subsequently acquiring the tenement this grant would become effectual; but this is more properly a part of the law of estoppel.]

Grant of easement for house to be built.

By the civil law, although it was clearly established that a servitude could be acquired only by the proprietor of the heritage to be benefited by it (b); yet where, at the date of the grant, there was an intention to erect the building to which the servitude was to be attached, the right so conferred was valid (c).

Civil law.

It followed from this rule that every servitude must be productive of advantage to the dominant tenement. A mere restriction upon the rights of the servient owner was invalid, if unaccompanied by any benefit to the dominant owner, or if such benefit were merely a personal one to him (d).

For the same reason no servitude could exist, unless the dominant and servient tenements were sufficiently near to allow the one to receive a benefit from the subjection of the other (e).

(a) Per Lord Chancellor in *Caledonian Rail. Co. v. Sprot*, 2 Macq. S. A. 453; and see the observations of Lord Wensleydale in *Roubotham v. Wilson*, 8 H. L. C. p. 364, upon a kindred point; and *Rymer v. McIlroy*, [1897] 1 Ch. 528, where the grantee was a yearly tenant at the date of the grant and afterwards acquired the fee. And see *North British Rail. Co. v. Park Yard Co., Ltd.*, [1898] A. C. 643, where it was held that the fact that the dominant tenement had not been acquired at the date of the instrument granting a right of way did not prevent the servitude becoming a legal accessory to the dominant tenement.

(b) Nemo enim potest servitutem acquirere, urbani vel rustici prædii, nisi qui habet prædium.—Inst. 2, 3, 3, de serv. præd.

(c) Future ædificio, quod nondum est, vel imponi vel acquiri servitus potest.—Dig. 8, 2, 23, § 1, de serv. præd.

(d) Ut pomum decerpere liceat, et ut spatium, et ut cognare in alienâ possimus, servitus imponi non potest.—Dig. 8, 1, 8. Ibid.

(e) Quod si sedes meæ a tuis ædibus tantum distant ut prospici non possint; aut medius mons earum conspectum auferat, servitus imponi non potest.—Dig. 8, 2, 38, de serv. urb. præd.

Nemo enim propriis ædificiis servitu-



Civil law.

The servitude, when once acquired, passed with the heritage into the hands of each successive owner (*f*).

Easements  
in gross.

Many personal rights, which, in their mode of enjoyment, bear a great resemblance to easements, as, for instance, rights of way, may be conferred by actual grant, independently of the possession of any tenement by the grantee; but such rights, though valid between the contracting parties, do not possess the incidents of an easement. In case of disturbance of a personal right thus given, the remedy would appear to be upon the contract only (*g*).

tem imponere potest, nisi et is qui cedit, et is cui ceditur, in conspectu habeant ea ædificia, ita ut officere alterum alteri potest.—Dig. 8, 2, 39. Ibid.

Neratius libris ex Plautio ait: nec haustum pecoris, nec appulsum, nec cretæ eximendæ, calcisque coquendæ, jus posse in alieno esse, nisi fundum viciniū habeat; et, hoc Proculum et Attiliū existimasse, ait.—Dig. 8, 3, 5, § 1, de serv. præd. rust.

In rusticis autem prædiis impedit servitutem medium prædium quod non servit.—Dig. 8, 3, 7. Ibid.

[See, on this point, *Birmingham Banking Co. v. Ross* (1888), L. R. 38 Ch. Div. 295.]

(*f*) Si fundus serviens, vel is cui servitus debetur, publicaretur, utroque casu durant servitutæ; quia cum suâ conditione quisque fundus publicaretur.—Dig. 8, 3, 23, § 2, de serv. præd. rust.

Cum fundus fundo servit, vendito quoque fundo, servitutæ sequuntur.—Dig. 8, 4, 12, comm. præd.

(*g*) [Upon this paragraph Mr. Willes had the following note:—"It may be questioned, however, whether the owner of an easement in gross would not have the same remedies which he would have if it were appurtenant; a right of common or other profit à prendre may be claimed as a right in gross (see text), and there should seem to be no reason why an incorporeal right, not involving participation in the profits of the servient tenement, should not be capable of being conferred in like manner with an incorporeal right involving such participation. The case of *Ackroyd v. Smith* (1850), 10 C. B. 164, is not inconsistent with this position. The point decided by that case is, that a right of way cannot be so granted as to pass to the successive owners of land, as such, in cases where the way is not

connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant; in fact the grant in that case is an instance of an attempt to create a new kind of estate, a right of way at the same time in gross and appurtenant: in gross in that it was in fact unconnected with the enjoyment of the land to which it was attempted to make it appurtenant, and appurtenant in that the grant purported to limit it so as to go to the successive owners of that land in succession. This attempt of course failed, but the case does not affect the position, that as profits à prendre may be claimed in gross, so also mere easements may be claimed in gross, and that such right may be accompanied with all the same remedies as easements appurtenant, and that the burden of them may run with the tenement over which they are claimed. Lord St. Leonards, in 1 Macquoen, S. A. p. 312, expressly laid down that a dominant tenement is not necessary for the existence of an easement according to the English law, and some of the cases quoted are instances to show that the existence of easements in gross is recognized by that law. The present treatise, however, is confined to those which are accessory to tenements. See post, Part II. Chap. III. Sect. 1, upon the question whether such an easement would be within Lord Tenterden's Act."

It is undoubtedly true that the decision in *Ackroyd v. Smith* is not opposed to the position here contended for, and also that the expression "easements in gross" is used in certain of the cases referred to above (p. 3) to denote the customary rights in the nature of easements to which the cases refer (cf. L. R. 22 Ch. Div. 707). But there is no case (except, perhaps, *Senhouse v. Christian* (1787), 1 T. R. 560;

[“There can be no easement, properly so called, unless there be both a servient and a dominant tenement. It is true that in the well-known case of *Dovaston v. Payne* (h), Mr. Justice Heath is reported to have said, with regard to a public highway, that the freehold continued in the owner of the adjoining land subject to an easement in favour of the public; and that expression has occasionally been repeated since that time (i). That, however, is hardly an accurate expression. There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement. It is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement” (k).]

Easements  
in gross.

*Rangeley v.  
Midland  
Rail. Co.*

It follows from the general rule that it is not competent to a vendor to annex to land rights unconnected with its use or enjoyment. In *Ackroyd v. Smith* (l), the defendants in an action of trespass quare clausum fregit, pleaded a conveyance to A. of a certain close together with the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing for all purposes over the locus in quo, a conveyance by A. to themselves of the same close and its appurtenances, and a user by themselves “for their own purposes.” On demurrer, the plaintiff had judgment on the ground that the right claimed, not being limited to purposes connected with the use and enjoyment of the

Easement  
must be con-  
nected with  
dominant  
tenement.  
*Ackroyd v.  
Smith.*

1 R. R. 300) which supports the position that there may be private or prescriptive easements in gross; the reasoning in *Ackroyd v. Smith* and the allied cases is distinctly opposed to the contention, and the judgment in *Rangeley v. Midland Rail. Co.*, cited in the next paragraph of the text, is an authority on the other side.

It should, however, be mentioned that Mr. Willes’ note was quoted without disapproval in *Mounsey v. Ismay* (1863), 3 H. & C. at p. 498, and in *Shuttleworth v. Le Fleming* (1865), 19

C. B. N. S. at p. 695.]

(h) (1795), 2 H. Bl. 527; 2 Sm. L. C. 6th ed., p. 132; 3 R. R. 497.

(i) See, e.g., *St. Mary, Newington v. Jacobs* (1871), L. R. 7 Q. B. 47, p. 54.

(k) Per Lord Cairns, L. J., *Rangeley v. Midland Rail. Co.* (1868), L. R. 3 Ch. 310. Cf. *Hawkins v. Rutter*, [1892] 1 Q. B. 668. As to the rights of the public in a highway, see *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142; *Hickman v. Maisey*, [1900] 1 Q. B. 752.

(l) (1850), 10 C. B. 164; 84 R. R. 507.

*Ackroyd v. Smith.* [close, could not be annexed to land so as to pass to a grantee as appurtenant to it.

*Thorpe v. Brumfitt.*

*Thorpe v. Brumfitt* (n) is not inconsistent with *Ackroyd v. Smith*. There, Pollard was the owner of an inn; Morrell granted him, in exchange for an old right of way to the inn, a piece of land adjoining the inn-yard and a right of way for all purposes through and along a certain road between the piece of land conveyed and a street. The Lords Justices held that the new way was capable of being made appurtenant to the land conveyed and passed with it; for, construing the grant reasonably, it meant a right of way between the highway and the yard of the inn, the triangular piece of ground not being intended to be held as a separate tenement, but being granted only for the purpose of being thrown into the yard, so as to make it a more convenient boundary line between the properties of the grantor and grantees. Mellish, L. J., observed that, in *Ackroyd v. Smith*, the close to which it was sought to make the way appendant was not at the end of the road, and the purposes for which the right of way was there granted were to a great extent unconnected with the use of the close to which that right was claimed as appurtenant.

*Bailey v. Stephens.*

In *Bailey v. Stephens* (n), the principle of *Ackroyd v. Smith* was applied to a profit à prendre, and a claim of a prescriptive right in the owners or occupiers of close A. to enter close B. and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon, as to close A. appertaining, was held void. "It is," said Erle, C. J., "a claim . . . of a right as appurtenant to the estate, and yet wholly unconnected with the estate . . . I cannot find any authority for such a claim." Probably such a right might be created by agreement, and be assignable, as a licence in gross coupled with a grant (o).

*Ellis v. Mayor of Bridgnorth.*

In *Ellis v. Mayor of Bridgnorth* (p), a market had from time immemorial been held in the street of Bridgnorth before the plaintiff's house; and he claimed the right to have a stall on market days before his house. The defendants removed the market, and the plaintiff sued them for the disturbance of his right. The Court held that the right was probably conferred in consideration that the holding the market must necessarily diminish on market days the trade of the shops, and the shopkeepers were therefore

(m) (1873), L. R. 8 Ch. 650.

(n) (1862), 12 C. B. N. S. 91.

(o) See above, p. 2.

(p) (1863), 15 C. B. N. S. 52.

[privileged to advance their shops into the market, that the enjoyment of the stalls by them was sufficiently connected with the enjoyment of land to satisfy the rule of law acted upon in *Ackroyd v. Smith* and *Bailey v. Stephens*, and that, as the right originated in a grant from the owners of the market, their successors could not derogate from that grant by changing the site of the market-place (q).]

*Ellis v. Mayor of Bridgnorth.*

In the case of *Bailey v. Appleyard* (r), it was intimated on high authority that a plea to turn cattle on land generally, without stating for what purpose, is bad. [But all that the learned judge meant was, that it must be shown by proper averment in the pleading in what respect the right to enter arises (s). He could not have intended that a plea of a right of common in gross would be bad; for it is clear that such a right may exist, and that a man may claim to be entitled, by grant or by prescription, to a right of pasture in gross, giving to him and his heirs, independently of the possession of any land or several pasture by them, the right of turning a definite and limited number of cattle upon the land over which the right of common is claimed (t).]

*Bailey v. Appleyard.*

SECT. 5.—*There must be Two distinct Tenements,—the Dominant, to which the right belongs,—and the Servient, upon which the obligation is imposed.*

It is obvious that if the dominant and servient tenements are the property of the same owner, the exercise of the right which in other cases would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure, without in any way increasing or diminishing those rights.

There must be two tenements.

(q) See further on this subject, *Kensit v. Great Eastern Railway* (1884), L. R. 27 Ch. Div. 122, and cases there quoted.

Of course, it is no objection to an easement that its exercise may incidentally confer a benefit on some tenement other than the dominant tenement. *Simpson v. Godmanchester Corporation*, [1897] A. C. 696.

(r) (1838), 3 Nev. & Per. 257; 8 A. &

E. 161, per Little Dale, J.; 47 R. R. 637.

(s) See, per Maule, J., in *Peter v. Daniel* (1848), 5 C. B. 577.

(t) Blackstone, vol. 2, p. 34; *Welcome v. Upton* (1840), 6 M. & W. 536; 55 R. R. 727; [*Barrington's Case* (1611), 8 Rep. 136 b; *Bailey v. Stephens* (1862), 12 C. B., N. S. 91.]

There must  
be two  
tenements.

It is therefore essential that the dominant and servient tenements should belong to different owners: immediately they become the property of the same person the inferior right of easement is merged in the higher title of ownership (*u*).

This principle is thus laid down by Bracton: "Nemini servire potest fundus suus proprius, quia prædiorum, aliud liberum, aliud servituti suppositum" (*x*).

"Et talis dici poterit constitutio quâ domus domui, rus ruri, fundus fundo, tenementum tenemento, subjungatur: et non tantum personæ per se, vel tenementum per se, sed uterque simul, tam tenementum, quam personæ" (*y*).

"A servitude is a charge imposed upon an heritage for the use and advantage of an heritage belonging to another proprietor" (*z*).

[It is not essential, in order that an easement created by grant should become a legal accessory of the dominant tenement, that the dominant tenement should have been actually acquired at the date of the grant (*a*).]

#### SECT. 6.—*By the Civil Law the Causes of Easements must be Perpetual.*

Civil law.

By the civil law the causes of easements must be perpetual (*b*).

It is not to be understood by this position that the civil law required the enjoyment of an easement to be continuous and necessarily perpetual, conditions which in many cases would be obviously impossible (*c*); but only that the qualities thus im-

(*u*) Nulli enim res sua servit.—Dig. 8, 2, 26, de serv. præd. urb. Si quis ædes quæ suis ædibus servirent cum emisset, traditas sibi accepit, confusa sublataque servitus est.—Ibid. 30. See *Holmes v. Goring* (1824), 2 Bing. 83; 9 Moore, 166; 27 R. R. 549; [*James v. Plant* (1836), 4 A. & E. 761; 43 R. R. 465; *Hawkins v. Rutter*, [1892] 1 Q. B. 668; and see as to merger, below, Part IV. Chap. II.]

(*x*) Lib. 4, f. 220.

(*y*) Ibid. f. 221.

(*z*) Code Civil, art. 637.

(*a*) *North British Rail. Co. v. Park Yard Co. Ltd.*, [1898] A. C. 643.

(*b*) Foramen in imo pariete conclavis vel tridlinii quod esset proluendi pavimenti causâ, id neque flumen esse, neque tempore acquiri, placuit. Hoc ita verum est si in eum locum nihil ex cælo aquæ

veniat: neque enim perpetuam causam habet, quod manu fit; at quod ex cælo cadit, etsi non assidue fit, ex naturali tamen causâ fit, et ideo perpetuo fieri existimatur. Omnes autem servitutes prædiorum perpetuas causas habere debent; et ideo, neque ex lacu, neque ex stagno, concedi aquæ ductus potest. Stillicidii quoque immittendi, naturalis et perpetua causa esse debet.—Dig. 8, 2, 28, de serv. præd. urb.

Servitus aquæ ducendæ, vel hauriendæ, nisi ex capite, vel ex fonte constitui non potest.—Dig. 8, 3, 2, de serv. præd. rust.

(*c*) Tales sunt servitutes, ut non habeant certam continuamque possessionem; quia nemo tam continenter ire potest, ut nullo momento possessio ejus interpellari videatur.—Dig. 8, 1, 14, de serv.

pressed upon the dominant and servient tenements should be in their nature permanent, and such as were capable of continuing in their present condition for an indefinite period.

Civil law.

If, from the nature of the servient tenement, the enjoyment could only continue during a limited space of time, as where water was drawn from a mere artificial collection, no servitude was acquired.

The rule laid down by Vinnius is, "That a servitude has a perpetual cause where it is natural, though not constant, as rain-water, which falls naturally, though not constantly; and that those servitudes which arise by the act of man have also a perpetual cause, if the tenement, or any part of it, has been adapted or prepared (*parata*) for its enjoyment, as the immission of smoke" (*d*).

Bracton appears to have recognized this as an essential element: after laying it down that a man may have an assize for disturbance of his "*haustus aquæ*," he continues, "*Sed hoc (breve) non est de cisternâ, quia cisterna non habet aquam perpetuam, nec aquam vivam, quia cisterna imbribus concipitur*" (*e*). English law.

The want of direct authority upon this point in the law of England (*f*), renders it difficult to determine to what extent this principle is admitted by it; and even in the civil law it is by no means easy to define the rule with precision. For though it is there laid down that nothing which depended upon the mere act of man (*quod manu fit*), as a discharge through an aperture in the wall of water used in washing the pavement, could constitute a servitude, it seems clear that a servitude might be acquired to discharge smoke and steam arising from hot baths, the use of which would obviously be of equally uncertain duration, and arising directly from the hand of man (*g*). [Perhaps the apparent inconsistency may be explained by considering that, in the first instance, the tenement from which the water is discharged is regarded as the servient one, and the rule prevents the adjoining

Difficulties in applying the rule.

(*d*) *Perpetuum illis est quodcumque ex naturali causâ oritur etsi non sit assiduum, ut ecce, aqua pluvia ex naturali causâ oritur, etsi non assidue pluit; quod enim naturaliter fit, perpetuum videtur, licet non fiat assidue, ut defectio lunæ. Sed et quod ex facto nostro oritur, perpetuum habetur, si ejus causâ prædium aut pars prædii parata est, ut fumi immissio.*—Vinnius, ad Inst. lib. 2, tit. 3.

(*e*) Lib. 4, f. 233.

(*f*) [See below, p. 20.]

(*g*) *Nam et in balineis inquit vaporibus, cum Quintilla uniculum pergentem in Urbi Julii instruxisset, placuit, potuisse tales servitudes imponi.*—Dig. 8, 5, 8, § 7, si serv. vind. [The observation in the text also applies to a right of sewerage, which, according to the civil law, may constitute a valid servitude.—Dig. 8, 1, 7, de serv.]

Civil law.

[owner from insisting on a continuance of the discharge; while in the second instance the tenement discharging the smoke is the dominant one, and the rule does not apply. If the owner of the tenement receiving the smoke were (per impossibile) to insist on its continuing to ascend into his room, the rule in question would become applicable, and would be an answer to his claim. "Cause" in these instances seems to mean origin or motive power.

And now the rule, so far as it extends to the servient tenement, has been, not expressly but in fact, adopted in the English courts, and is illustrated by the cases of *Arkwright v. Gell* (h), *Wood v. Waud* (i), *Greatrex v. Hayward* (k), *Gaved v. Martyn* (l), *Mason v. Shrewsbury and Hereford Rail. Co.* (m), *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (n), and *Burrows v. Lang* (o)—all of which are discussed below (p).

"The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variation.

"The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right" (q).

The rule in *Arkwright v. Gell* (h) has not up to this time been applied to any easement other than the right to receive water; and

(h) (1839), 5 M. & W. 203; 52 R. R. 671.

(i) (1849), 3 Exch. 748; 77 R. R. 809.

(k) (1853), 8 Exch. 291; 91 R. R. 493.

(l) (1866), 19 C. B., N. S. 732.

(m) (1871), L. R. 6 Q. B. 578.

(n) (1878), L. R. 4 App. Cas. 121.

(o) [1901] 2 Ch. 502.

(p) Part III. Chap. I. Cf. *N. E. R. v. Elliott* (1860), 1 J. & H. 145; 10 H. L. C. 333; and *McEvoy v. Great Northern Rail. Co.*, [1900] 2 Ir. R. 325.

(q) Per Pollock, C. B., 3 Exch., p. 777.

[the instances given in the authorities on the civil law all concern the same easement. But it is conceivable that the same question might be raised with reference to other claims: for instance, with reference to a right of way over a structure erected for temporary purposes. And it is conceived that the rule, which rests on a reasonable basis, would always be applied in a proper case.

The question here discussed may be thought to have a bearing on the subject of support to buildings by buildings, which will be considered later (r).

There is one English case in which a like rule seems to have been applied to the dominant tenement. In *Maberly v. Douson* (s), a predecessor in title of the plaintiff had erected a manufactory or workshop upon pillars fixed into stone plinths, which stone plinths rested upon brickwork the bottom of which was three feet below the level of the ground. A window in this workshop had remained unobstructed for more than twenty years; and the plaintiff claimed to have an ancient light there. The Court disallowed the claim. "This building was not attached to the freehold, but was a mere contrivance for temporary purposes, and would not pass with the inheritance. The Court do not decide what the plaintiff's right would have been had this building been a part of the freehold; but we think, considering the nature of the building, that it is impossible to infer the consent of the owner or occupier of the adjoining land, and therefore that there should be judgment for the defendant."]

*Maberly v. Douson* 1.

(r) Part III. Chap. IV. Sect. 3.

(s) (1827), 5 L. J., K. B. 261.



## CHAPTER III.

## SUBJECTS OF EASEMENTS.

Variety of:  
easements.

THE number or modifications of rights of this kind may be infinite both in their extent and mode of enjoyment, as the convenience of man in using his property requires (a). "To descend now," says Lord Stair, "to the kinds of servitudes, there may be as many as there are ways whereby the liberty of a house or tenement may be restrained in favour of another tenement; for liberty and servitude are contraries, and the abatement of the one is the being or enlarging of the other."

Affirmative  
and negative.

From the civil law may be taken a practically useful division of easements into two principal classes, which may be termed affirmative and negative. Those coming under the head of affirmative easements authorize the commission of acts which, in their very inception, are positively injurious to another—as a right of way across a neighbour's land, or a right to discharge water—every exercise of which rights may be the subject of an action. Negative easements are injuries consequentially only—restricting the owner of the soil in the exercise of the natural rights of property—as where he is prevented building on his own land to the obstruction of lights. With respect to this latter class, it is

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(a) Nullum est dubium quia plures esse possint hujus generis servitudes, pro diversâ ratione edificandi et habitantium necessitate.—Heineccius, *El. J. C.*, Lib. 8, § 148.

[But "it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner"; per Lord Brougham in *Keppell v. Bailey* (1834), 2 M. & K. at p. 635; 39 R. R. 264. Cf. *Hill v. Tupper* (1863), 2 H. & C. 121. There can be no such thing as a *jus spatiandi*. See per Farwell, J., *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165, at p. 172; *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188, at p. 198. As to a tunnel,

see *Metropolitan Rail. Co. v. Fowler*, [1893] A. C. 416; *In re Pearson's Will* (1900), 83 L. T. 626. In the former case, it was held that upon the true construction of the plaintiff company's special Act, a tunnel constructed under a highway for the purpose of their railway was a "hereditament" within the meaning of 38 Geo. III. c. 5, s. 4, and not a bare easement. In the latter case, it was held that a sale to a railway company of the right to construct, maintain, and use tunnels in the subsoil of certain settled land was a sale of the subsoil, and not the sale of an easement under sect. 3 of the Settled Land Act, 1882.]

evident that no cause of action can arise from their exercise; they can be opposed only by an obstruction to their enjoyment.

The English law furnishes the following amongst other in- **Affirmative.**  
stances of affirmative easements :—

Rights of way.

[Right to make surface uneven by working mines in such manner as to let it down (*b*).

Right to go on soil of another to clear a mill stream and repair its banks (*c*), or to open locks in time of flood (*d*).

Right to go on a neighbour's close, and draw water from a spring there (*e*).

Right to conduct water across a neighbour's land by an artificial watercourse, and to go upon that land for the purpose of turning the water into the same (*f*).

Right to use or to affect water of natural stream in any manner not justified by natural right.

Right to discharge water or other matter on to a neighbour's land.

Right to make spoil banks upon surface in course of working minerals (*g*).

Right to use close for purpose of mixing muck and preparing manure there for an adjoining farm (*h*).

Right to discharge rain-water by a spout or projecting eaves (*i*).]

Right to support from a neighbouring wall.

[Right to drive a pile into the bed of a river for the more convenient use and enjoyment of a wharf (*k*).

(*b*) In *Rowbotham v. Wilson* (1860), 8 H. L. C. 362, it is laid down that such an easement may be granted to the owner of a stratum of minerals. It should seem that it might also be granted to the owner of a right to take minerals in alieno solo; see ante, p. 12 (note *z*), as to the distinction.

(*c*) Lord Campbell in *Beeston v. Weats* (1856), 5 E. & B. 996; *Peter v. Daniel* (1848), 5 C. B. 568; *Roberts v. Fellowes* (1906), 94 L. T. 279.

(*d*) *Simpson v. Godmanchester Corporation*, [1897] A. C. 696.

(*e*) See *Race v. Ward* (1855), 4 E. &

B. 702.

(*f*) *Beeston v. Weats* (1856), 5 E. & B. 986.

(*g*) *Rogers v. Taylor* (1857), 1 H. & N. 706; *Earl of Cardigan v. Armitage* (1823), 2 B. & C. 197; 26 R. R. 313.

(*h*) See *Pye v. Mumford* (1848), 11 Q. B. 666; 75 R. R. 582, where the pleader claimed the right as a profit à prendre.

(*i*) [*Harvey v. Walters* (1873), L. R. 8 C. P. 162.]

(*k*) *Lancaster v. Eve* (1859), 5 C. B., N. S. 717.

Affirmative.

[Right to a fender in a mill stream to prevent a waste of water (*l*).

Right to have a name plate on a door (*m*).

Right to have a sign post on a common before a public-house (*n*).

Right to affix a sign board to the wall of a neighbouring house (*o*).

Right to nail fruit trees to a wall (*p*).

Right to place stones, rocks or piles on neighbour's land to protect and secure buildings from encroachment by the sea (*q*).

Right to use a fascia embedded in a neighbouring wall (*r*).]

Right to carry on an offensive trade.

Right to hang clothes on lines passing over the neighbouring soil (*s*).

Right to bury in a particular vault (*t*).

[Right to pew in a church (*u*).]

The principal negative easements are:—

Negative.

Right to receive light and air by windows.

Right to support of neighbouring soil [for buildings (*r*).

Right to receive a flow of water in an artificial stream (*x*).]

(*l*) *Wood v. Hewett* (1846), 8 Q. B. 913; 70 R. R. 689.

(*m*) *Lane v. Dixon* (1847), 3 C. B. 776; 71 R. R. 484.

(*n*) *Hoare v. Metropolitan Board of Works* (1874), L. R. 9 Q. B. 296.

(*o*) *Moody v. Steggles* (1879), L. R. 12 Ch. D. 261. [In an American case (*Richardson v. Pond*, 15 Gray (Mass.), 387), the Court recognized a right to deposit merchandise in a passage-way and hoist it from thence into a window, and for that purpose to swing shutters over the passage-way.]

(*p*) *Hawkins v. Wallis* (1763), 2 Wils. 173.

(*q*) *Philpot v. Bath* (1906), 21 T. L. R. 634; W. N. 114.

(*r*) See *Francis v. Hayward* (1882), L. R. 20 Ch. D. 773; 22 Ch. Div. 177. The fascia was held to be part of the plaintiff's premises; but, if it had been necessary, the judges were prepared to recognize an easement to use it. Cf. *Reilly v. Booth* (1890), L. R. 44 Ch. D. 12.

(*s*) See *Dreucell v. Towler* (1832), 3

B. & Ad. 735. [A claim to have trees overhanging a neighbour's land was negatived: *Lemmon v. Webb*, [1894] A. C. 1.]

(*t*) *Bryan v. Whistler* (1828), 8 B. & C. 288; S. C., 2 Man. & Ry. 318; 32 R. R. 389. [*Moreland v. Richardson* (1856), 22 Beav. 596.]

(*u*) See Best on Presumptions, p. 111; *Dauncey v. Dee* (1621), Cro. Jac. 605; *Hinde v. Charlton* (1866), L. R. 2 C. P. 104; *Brumfitt v. Roberts* (1870), L. R. 5 C. P. 224; *Greenway v. Hockin* (1870), L. R. 5 C. P. 235; *Crisp v. Martin* (1876), L. R. 2 P. D. 15; *Philipp v. Halliday*, [1891] A. C. 228; *Stilemann-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.

(*v*) The learned author stated, in the 2nd edit. of this work, that the right to the support of the neighbouring soil for land not encumbered by buildings, is not an easement; and the subsequent decisions show that his view was well founded, and that such a right is an ordinary right of property: see the

(*x*) See next page.

Easements may also be divided into continuous and discontinuous, and into apparent and non-apparent.

Continuous  
and discontinuous.

"Continuous servitudes are those of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a waterspout, or right to light and air.

"Discontinuous servitudes are those the enjoyment of which can only be had by the interference of man, as rights of way, or a right to draw water" (y).

"Apparent servitudes are those the existence of which is shown by external works (*ouvrages extérieurs*), as a door, a window, a watercourse.

Apparent and non-apparent.

"Non-apparent servitudes are those which have no external sign of their existence; as the prohibition to build on particular land, or to build above a certain height" (z).

This illustration of a "door" seems inexact. By "signe apparent" appears to be meant not merely some visible indication of the intention to use an easement, but some permanent change of one or other of the tenements, indicating that one is subjected necessarily to the convenience of the other. A "door," considered as an opening for the use of a right of way, would not satisfy this condition (a).

"There are," says Merlin, "some servitudes, which are called non-apparent (*cachées*), which manifest themselves by an exterior sign; as, for example, where I have a right of way in the court or garden of my neighbour, and I have a door which announces this right of way" (b).

The leading division of *prædial servitudes* in the civil law, but Urban and

cases cited Part III. Chap. IV. Sect. 1. The present work treats as well of such natural right as of that which is acquired by grant or user, but the passage in the text applies of course to the latter only.

It has been lately doubted whether the right to support for buildings may not be after all an affirmative easement: see *Dalton v. Angus*, quoted in the section above referred to.

(x) *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), 4 A. C. 121, 126; *Kensit v. Great Eastern Rail. Co.* (1884), 27 C. D. 122, per Cotton, L. J., 134; *Baily & Co. v. Clark, Son & Morland*, [1902] 1 Ch. 649.

The right to receive a flow of water

of a natural stream was formerly included in this class, but the cases cited post, Part III. Chap. I., decide that it is an ordinary right of property, and not an easement.

(y) Code Civil, art. 688.

(z) Code Civil, art. 689. [These distinctions were first found in the Code Civil: per Lord Blackburn, L. R. 6 App. Cas. at p. 821.]

(a) [See below, page 137, ff.]

(b) *Répertoire de Jurisprudence*, tit. Servitude, p. 50. The case above suggested by Merlin is precisely that of *Pheysey v. Vicary* (1847), 16 M. & W. 484; 73 R. R. 583, substituting for a "door" a visible hard carriage drive.

Apparent and  
non-apparent.

rustic servi-  
tutes.

which appears to afford no practically useful distinction in the English law, is into urban and rustic servitudes—the former including all servitudes relating to buildings wherever situated; the latter, all those relating to land uncovered by buildings, whether situated in town or country.

The rustic servitudes comprised rights of way and watercourses and rights to drive cattle to water (*c*); the urban servitudes comprehended all those which belonged to a building, as eaves-droppings, support of beams, rights to light (*d*).

(*c*) Porro autem ud prædia vel rustica sunt vel urbana, ita quoque et servitutes quæ iis inhaerent, vel rusticae sunt, vel urbanae. Prædia rustica sunt, loca ædificiis vacua, in urbe area, ruri ager; non enim loco, sed materie et genere, distinguuntur.—Vinnius, ad Inst. lib. 2, tit. 3.

Rusticorum prædiorum jura sunt hæc; iter, actus, via, aquæ ductus.—Inst. 2, 3, præf.

Inter rusticorum prædiorum servitutes quidam computari rectè putant, aquæ haustum, pecoris ad aquam adpulsium, jus pascendi, calcis coquendæ, arenæ fodiendæ.—Ibid. § 2.

(*d*) Prædiorum urbanorum servitutes sunt hæc, quæ ædificiis inhaerent; ideo urbanorum prædiorum dictæ quoniam

ædificia omnia urbana prædia appellamus, etæi in villâ (in the country, Dig. 50, 15, 211) ædificata sint. Item urbanorum prædiorum servitutes sunt, ut vicinus onera vicini sustineat, ut in parietem ejus liceat vicino tignum immittere, ut stillicidium vel flumen recipiat quis in sedes suas, vel in aream, vel in cloacam, ne altius quis tollat sedes suas, ne luminibus vicini officiat.—Ibid. § 1.

Et denique projiciendi, protegendique.—Dig. 8, 2, 2, de serv. præd. urb.

Jus cloacæ mittendæ servitus est.—Dig. 8, 1, 7, de serv.

Est et hæc servitus ne prospectui officiat.—Dig. 8, 2, 3, de serv. præd. urb.

## PART II.

### OF THE ACQUISITION OF EASEMENTS.



### INTRODUCTION.

THE origin of some easements is as ancient as that of property. Origin of easements.  
 One tenement may be subjected to the convenience of another by the hand of nature itself; the inferior elevation of one in relation to the other may subject it to the fall of water from the higher ground. A similar disposition may be produced by the act of man permanently changing their previous relation, and thus affixing to them qualities with which they were not originally invested; as when, by the erection of buildings, water is discharged upon the neighbouring land, or light and air are received through a window. Other easements [involve] no apparent change in the condition of the two tenements, but exist only by a repetition of the acts of man, as rights of way.

“The origin of servitudes,” says an eminent French writer, “is as ancient as that of property, of which they are a modification. By their natural disposition the inferior lands were placed in a species of dependence on those more elevated, and the first possessors of the soil recognized the indispensable necessity of such subjections. When the extension of cultivation brought men nearer together, and the want of a common defence formed the first society, public utility and safety led to the conviction, that it was necessary to restrict in certain cases rights legitimate in themselves, but the absolute exercise of which by individuals could not take place, without rendering some properties almost valueless. In a short time similar rights were stipulated for by private persons, as matter of utility, or even pleasure. Thus, from the disposition of nature, the wants of society, and the agreements of individuals, have originated prædial servitudes” (a).

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(a) Pardessus, *Traité des Servitudes*, S. 1.

Civil law.

By the civil law, the origin of servitudes was referred to "lex, natura loci, vetustas" (b).

Law of  
England.

By the law of England, the origin of rights of this kind [other than the "natural" or common law rights above described], is referred either to an express contract between the parties, or to a similar contract implied from the peculiar relation of the parties at the time they became possessed of their respective tenements, or from the long continued exercise of the right (c).

The cases of express agreement are of comparatively rare occurrence, and present, for the most part, but little difficulty, as far, at least, as concerns the mere extent of the right so conferred. By far the greater proportion of easements rest on implied agreements, the terms and conditions of which can be collected only from the actual amount of enjoyment proved to have been had.

(b) In summâ tria sunt per quæ inferior locus superiori servit. Lex, natura loci, vetustas, quæ semper pro lege habetur; minuendarum scilicet litium causâ. —Dig. 39, 3, 2, de aq. et aq. pl. arc.; Cod. 7, 22, 2, de longi temporis.

(c) [See the judgment of Littledale, J., in *Moore v. Rawson* (1824), 3 B. & C. 339; 27 R. R. 375; and *Angus v. Dalton* (1877), L. R. 3 Q. B. D. at p. 93, per Lush, J. And so Bracton says (lib. 4, cap. 37), "Item pertinere poterunt (ser-

vitutes) sine constitutione per longum usum continuum et pacificum, et non interruptum per aliquod impedimentum contrarium, ex patientia inter præsentis, quæ trahitur ad consensum."

But it is now generally thought that, in the absence of fraud, continuous possession alone should, in English as in Roman law, be held to constitute a valid title, without resort being had to the fiction of an agreement.]

## CHAPTER I.

## OF THE ACQUISITION OF EASEMENTS BY EXPRESS AGREEMENT.

SECT. 1.—*From whom they may be acquired.*

[A LIMITED owner has no power under the Lands Clauses Consolidation Act, 1845 (a), to grant an easement; nor could a railway company or other public body, having simply the powers of that Act, purchase an easement at all (b). But special powers to acquire easements are now frequently given to railway companies.

Sect. 3 of the Settled Land Act, 1882 (c), empowers a tenant for life to "<sup>254</sup>let the settled land, or any easement, right or privilege of any kind over or in relation to the same" (d); and under sect. 6 of the same Act a tenant for life may grant a lease of "any easement, right or privilege of any kind over or in relation to" the settled land. Under this section it has been held (e) that a tenant for life, under a settlement of the surface of lands, may grant a lease of a right to let down the surface of the land, although, under the settlement, he had no power to work the minerals so as to let down the surface; and in the same case it was held that the fact that sect. 7 (3) of the Act (which provides that every lease shall contain a condition of re-entry for non-payment of rent) cannot be complied with in the case of a lease of an incorporeal hereditament, does not prevent a tenant for life from granting such a lease.

By the Settled Land Act, 1890 (f), any easement, right or privilege of any kind may, on an exchange or partition (g) of settled land be reserved or granted, or other land or an easement, right or privilege of any kind may be given or taken in exchange

(a) 8 & 9 Vict. c. 18.

(b) *In re Barrow-in-Furness Corporation and Rawlinson's Contract*, [1903] 1 Ch. 339. As to the grant of an easement by a railway company, see *Re Gonty and Manchester, Sheffield and Lincolnshire Rail. Co.*, [1896] 2 Q. B. 439.

(c) 45 & 46 Vict. c. 38.

(d) As to the limits of this power, see *Sutherland v. Sutherland*, [1893] 3 Ch. 169; *Re Pearson's Will* (1900), 83 L. T. 626; *Pease v. Courtney*, [1904] 2 Ch. 503.

(e) *Sitwell v. Earl of Lonsborough*, [1905] 1 Ch. 460.

(f) 53 & 54 Vict. c. 69, s. 5.

(g) See *Settled Land Act, 1882*, s. 3 (iii.) (iv.), 17.



[or on partition for land or for any other easement, right or privilege of any kind; and this provision authorizes an exchange of easements, apart from any exchange or partition of land (h).]

## SECT. 2.—*Nature of the Instrument.*

### (a.) *Common Law.*

Distinction between law and equity.

Law and equity are now administered concurrently in all the courts (i). But the distinction between legal and equitable rights is still material in certain cases, as in the case of a voluntary grant or agreement for a grant, or where a purchase for value without notice is pleaded; and it is convenient to treat them separately.]

Express concession of easement can be by deed only.

Whatever doubts may formerly have existed as to the creation of easements by express agreement, it seems to be now fully settled that, like all other incorporeal hereditaments, [at common law,] they can be created, [so as to be legally appurtenant to property,] only by an instrument under seal (k).

"And here," says Lord Coke (l), "is implied a division of fee or inheritance; viz., into corporeal, as lands and tenements, which lie in livery (m), comprehended in this word feoffment, and may pass by livery, by deed, or without deed; and incorporeal, which lie in grant, which cannot pass by livery, but by deed, as advowsons, commons, &c.; . . . and the deed of incorporeal inheritances doth equal the livery of corporeal. . . . Grant, *concessio*, is properly of things incorporeal, which, as hath been said, cannot pass without deed" (n).

Coparceners.

The only exception to the general rule appears to be in the case of coparceners; for, as "land or other things that lie in livery may pass between them without deed, so also may incorporeal hereditaments which lie in grant" (o).

(h) *Re Bracken's Settlement*, [1903] 1 Ch. 265.

(i) Jud. Act. 1873, ss. 24, 25.

(k) [Or by will: *Pearson v. Spencer* (1863), 3 B. & S. 761. Under the Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154), a letting of an easement or other incorporeal hereditament can be effected without seal in Ireland. See *Radcliffe v. Hayes*, [1907] 1 Ir. R. 101. And in Scotland also an easement can be created

by an instrument not under seal: *North British Rail. Co. v. Park Yard Co. Ltd.*, [1898] A. C. 643.]

(l) Co. Litt. 9 a.

(m) [Corporeal hereditaments now lie in grant also; 8 & 9 Vict. c. 106.]

(n) *Rex v. Inhabitants of Horndon-on-the-Hill* (1816), 4 M. & S. 562; and *Hewlins v. Shippam* and *Cocker v. Cowper*, below.

(o) *Johnson v. Willson* (1741), Willes, 253; Co. Litt. 169; 21 Edw. 3, 2.

Nevertheless, questions of considerable difficulty and nicety have been raised as to the effect of a licence; and it has been contended, "that a beneficial privilege in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing" (*p*).

Effect of a licence.

Upon a review of the authorities, however, it would appear that this position cannot be considered as law; and that the utmost effect [in this respect] of a licence is, that it may work the extinguishment of an existing easement,—as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it, to which the licensor was entitled.

Licence may work the extinction of an easement.

[It should be remembered, in considering the cases on the point, that a mere parol licence, not coupled with a grant, is at law revocable at any time by the licensor. But the licensee is not a trespasser until the licence is revoked; and he has a reasonable time after the withdrawal of the licence, to go off the land and to remove goods which he has been licensed to place there (*q*).]

Mere parol licence revocable.

In *Winter v. Brockwell* (*r*), the declaration stated, that the plaintiff was entitled to an easement of a passage for light and air to his dwelling-house, through an ancient window, over an open space of land of the defendant, and that, by means of such open space, noisome smells from the defendant's house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house, and that the defendant wrongfully erected a skylight above the plaintiff's ancient window, and covering the open space above mentioned, by means of which "the light and air were prevented entering the plaintiff's window and into his house, and noisome smells, arising from the adjoining house, were prevented from evaporating, and entered the plaintiff's dwelling-house." The defendant pleaded the general issue.

*Winter v. Brockwell*.

It appeared in evidence that the open space "which belonged to the defendant's house had been inclosed and covered by a skylight in the manner stated, with the express consent and approbation of the plaintiff, obtained before the inclosure was made, who also gave leave to have part of the framework nailed against his wall; some time after it was finished, the plaintiff objected to

(*p*) *Taylor v. Waters* (1817), 7 Taunt. 384; 18 R. R. 499, post, p. 35.

(*q*) *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334; *Mellor v. Watkins* (1874),

L. R. 9 Q. B. 400; *Wilson v. Tavener*, [1901] 1 Ch. 578.

(*r*) (1807), 8 East, 308; 9 R. R. 454.

*Winter v.  
Brockwell.*

it, and gave notice to have it removed; but Lord Ellenborough was of opinion, that the licence given by the plaintiff to erect the skylight, having been acted upon by the defendant and the expense incurred, could not be recalled, and the defendant made a wrongdoer, at least not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it. And, under this direction, the defendant obtained a verdict."

On a motion for a new trial, in support of which no argument appears to have been advanced, his Lordship said, "That the point was new to him when it occurred at the trial, but he then thought it very unreasonable that, after a party had been led to incur expense in consequence of having a licence from another to do an act, and the licence had been acted upon, that the other should be permitted to recall his licence and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books upon this point, and found himself justified by the case of *Webb v. Paternoster* (s), where Haughton, J., lays down this rule, that a licence executed is not countermandable, but only where it is executory. And here the licence was executed."

It is to be observed, in this case, that the action was brought for the consequential injury only, and not for the trespass committed on the plaintiff's land by affixing the iron work to his wall, as to which no point appears to have been made. The question arising on the Statute of Frauds, as to this being an interest in land, was, we are told in a note, "stated and overruled." The most important observation which suggests itself is on the statement of the injury in the declaration. The complaint appears to have been twofold: that is to say, the plaintiff complained that his easement—his passage of light and air to his ancient window—was obstructed, and also that he had been deprived of a distinct right, which every owner of property possesses without any prescription, and which can only be infringed upon by the acquisition of an easement on the part of his neighbour; viz., a right to enjoy his property without being subject to any private nuisances, such as the noisome smells mentioned in this case. From the loose manner in which the case is reported, it is not easy to say

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(s) (1620), *Palmer*, 71; 2 *Roll. Rep.* 152; *Poph.* 151.

whether the smells proceeded from the defendant's house or from the house of a third party; in *Hewlins v. Shippam* (t), the latter was considered to have been the case. Nor does it appear from the statement of facts in the report whether any such smells had actually been caused by the defendant, or whether, supposing any such smells to have been produced, evidence of a prescriptive right to make such a nuisance was adduced on the part of the defendant, the only injury alluded to in the judgment being the obstruction to the light and air. This case appears to have undergone very little consideration (u).

*Winter v.  
Brockwell.*

*Fentiman v. Smith* (x) was an action brought for diverting a watercourse from the plaintiff's mill. The declaration stated the plaintiff's possession of a mill, and that by reason thereof he was entitled to the use and benefit of the water of a rivulet, which, until the interruption complained of, flowed through a tunnel into another stream, whereon the plaintiff's mill was built; but that defendant cut a channel, and thereby diverted the water from running into the said tunnel, and so to the mill.

*Fentiman v.  
Smith.*

At the trial, it appeared that the tunnel was made in the defendant's land, and fixed into the ground with stone-work; that the defendant agreed for a guinea to let the plaintiff lay the tunnel, for the purpose of conveying the water to the mill; that defendant even assisted at the making of the tunnel, under the plaintiff's directions; but no conveyance was made of the land to the plaintiff; the guinea was afterwards tendered to the defendant, but he refused to receive it or to give his assent to the continuance of the tunnel, and made the obstruction complained of. A verdict having passed for the plaintiff, with leave to move to enter a nonsuit, in opposition to a rule obtained for this purpose, it was contended, "that it was sufficient for the plaintiff, against a wrongdoer, to declare upon his possession of the mill with the appurtenants;" but Lord Ellenborough said, "Such an allegation could not be sustained without showing that the *appurtenants* were *legally* such. Now here the title to have the water flowing in the tunnel over the defendant's land could not pass, by

(t) Post, p. 36.

(u) [It is, however, recognized as law by Tindal, C. J., in *Liggins v. Inge*, cited post, in this chapter; and (as was pointed out by Alderson, B., in *Wood v. Leadbitter*) was decided on grounds inapplicable to cases as to the mode of

creating an easement. In *Davies v. Marshall* (1861), 10 C. B., N. S. 711, Williams, J., said that *Winter v. Brockwell* and *Liggins v. Inge* have not been in the least shaken by subsequent cases.]

(x) (1803), 4 East, 107; 7 R. R. 533.

*Fentiman v.  
Smith.*

*parol licence without deed*, and the plaintiff could not be entitled to it, as stated in the declaration, by reason of his possession of the mill; but he had it by the licence of the defendant, or by contract with him: and if by licence it was revocable at any time. The enjoyment, with the defendant's assent, was not left as evidence to the jury to presume a grant, *but it was supposed that it gave a title in point of law, which it clearly did not.*"

This case is not only clear and positive in its language, but it derives additional importance as showing the construction that ought to be put upon any ambiguity of language occurring in a subsequent decision of the same learned Judge in *Winter v. Brockwell*; as it can hardly be supposed that, if he had changed his opinion and adopted a view quite contrary to that previously expressed by him, he would not have made some allusion to the case in which he had before given such a decided opinion.

*Taylor v.  
Waters.*

The principal authority in support of the position—that a parol licence, when executed, can pass an incorporeal hereditament—is the case of *Taylor v. Waters* (y). Gibbs, C. J., in delivering the judgment of the Court in that case, said: "This was an action against the door-keeper of the Opera House for denying admission to the plaintiff, who was the holder of a silver ticket, purporting to give him an entrance into that theatre for twenty-one years. It was objected, that the right claimed was an interest in land, and being for more than three years, could not pass without a writing, signed by the party or his agent authorized in writing, and that W. Tayler was not so authorized by the trustees. And it was further insisted by the defendant that such an interest could only pass by deed. The answer given to these objections was, that this was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges thereon, and was not required to be in writing by the Statute of Frauds, though it extended beyond the term of three years, and, consequently, might be granted without a deed; and though W. Tayler had affected to grant this by deed, it may bind the trustees, not as their deed, but as a licence authorized by them. In support of this doctrine the following cases are found:—*Webb v. Paternoster* (z), licence to the plaintiff from Sir W. Plummer to lay a stack of hay on his

(y) (1817), 7 Taunt. 382; 18 R. R. 499.

(z) (1620), Palm. 71; S. C., 2 Ro. Rep. 152; Poph. 151.

*Taylor v.  
Waters.*

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land for a reasonable time; afterwards Sir W. Plummer leased the land, and the lessee turned in his cattle and ate the hay, for which this action was brought. The Court held that such licence was good, and could not be countermanded within a reasonable time; but that more than a reasonable time had elapsed, half-a-year, and therefore the licence was at end. This case was recognized and acted upon by Lord Ellenborough and the Court of King's Bench in *Winter v. Brockwell* (a). This shows that a beneficial licence, to be exercised upon land, may be granted without deed, and cannot be countermanded, at least after it has been acted upon; and this would also be sufficient to show that this is not such an interest in land as, by the Statute of Frauds, can only pass by writing; but if any doubt remained upon the latter point, it has been long ago expressly decided by the Court of King's Bench in the case of *Wood v. Lake* (b), better reported in a MS. book of Mr. Justice Burrough, p. 51.—'Licence to stack coals on the defendant's close for seven years cannot be revoked at the end of three.' These cases abundantly prove that a licence to enjoy a beneficial privilege on land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing. What the plaintiff claims is a licence of this description, and not an interest in the land. That it was in the ordinary course of management to make such grants appears from the plaintiff not having been disturbed by the trustees while they had possession for some years, at least in and after 1800. He is, therefore, entitled to exercise the licence granted to him, and may maintain the present action against the defendant, who has disturbed him in it."

Assuming the right here claimed by the plaintiff to be an easement, it must be conceded that this case would be a direct authority for the position that an easement may be created by parol; it does not, however, rest on the foundation of any previous decision, except that in *Sayer*; the case of *Webb v. Paternoster* is in reality a mere dictum, as the Court was not called upon to decide the question as to the validity of the licence; and the case of *Winter v. Brockwell*, on which the Chief Justice seems principally to rely, is clearly no authority

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(a) (1807), 8 East, 308; 9 R. R. 454.

(b) (1751), *Sayer*, 3.

*Taylor v.  
Waters.*

for the position it is here cited to support, as is shown by several subsequent cases, in which the judgment of Lord Ellenborough has been fully considered (c).

Thus, comparatively unsupported by any earlier authority, it is directly at variance with numerous later decisions, in two of which the question has been most elaborately discussed.

*Hewlins v.  
Shippam.*

In the case of *Hewlins v. Shippam* (d), for a valuable consideration given by the plaintiff to the defendant, he assented to the plaintiff's making a drain at his own expense in his (the defendant's) land. The plaintiff made his drain at a considerable expense. In an action brought against the defendant for afterwards stopping up the drain, Graham, B., was of opinion that the right claimed under the licence granted by the defendant to have the drain in the soil of another was an uncertain interest in the land within the first section of the Statute of Frauds: and not being granted by any instrument in writing, the plaintiff acquired under it a right at will only, which was determined by the defendant's stopping up the drain. He therefore directed a nonsuit, with leave to the plaintiff to move to enter a verdict.

A rule having been obtained to set aside the nonsuit, the Court upon argument discharged it. The elaborate judgment of the Court, in which all the authorities are reviewed, was delivered by Bayley, J. "A right of way or a right of passage for water," said the learned Judge, "(where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot) otherwise than by deed. *Termes de la Ley*, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription, without profit; and it instances, 'as a way or sink through his land, or such like.' In *Co. Litt.* 9a, Lord Coke distinguishes between corporeal things which lie in livery and incorporeal which lie in grant, and cannot pass but by deed, as advowsons, commons, &c.; and it seems to be his opinion that (except in certain specified cases), where livery is necessary as to the one, a deed is necessary as to the other. The

(c) *Hewlins v. Shippam*, *Liggins v. Inge*, *Cocker v. Cowper*.

(d) (1826), 5 B. & Cr. 221; S. C., 7 D. & R. 783; 31 R. R. 757.

*Hawkins v.  
Shippam.*

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same may be collected from the passage already cited from Co. Litt. 42 a. In Co. Litt. 169, the excepted case of parceners is mentioned: and there it is said that though common of estovers or pasture, or a corody, or a way, lie in grant, they may, upon partition *between the parceners*, be granted without deed. So both Littleton and Lord Coke state, in the same part, that a rent may be granted in the case of parceners for owelty of partition without deed; and Lord Coke notices that rents, commons, advowsons, and the like, that lie in grant, though they cannot pass without deed, may be divided between parceners by parol without deed. Chattels, whether real or personal, may in general be granted without deed: Sheppard's Touchstone, 232; and in the case of things lying in livery, a demise thereof may be made for any number of years at common law without deed; but Lord Coke, in Co. Litt. 85 a, makes a distinction between original chattels and chattels created out of a freehold lying in grant, that the former may pass without deed, the latter cannot be created or pass without it; and whether there is a distinction in this respect between chattel interests created out of freeholds lying in livery and freeholds lying in grant (which I think there is not), it is not necessary to decide, because this is a case of a freehold, not of a chattel interest. Sheppard, in his Touchst. 231, lays it down that a licence or liberty (amongst other things) cannot be created or annexed to an estate of inheritance or freehold without deed. In 2 Rolle's Abr. 62, it is laid down that a thing lying merely in grant cannot pass without deed. In 9 Co. 9, it is said, *arguendo*, that tenant for life cannot *by word without deed* have the privilege of being dispunishable for waste; and that position is adopted in Sheppard's Touchst. p. 231. In Gilbert's Law of Evidence, p. 96, 6th edition, this is laid down: 'If a man shows title to a thing lying in grant, *he fails if the seal be torn off from his deed*; for a man cannot show a title to a thing lying in solemn agreement but by solemn agreement; and there can be no solemn agreement without a seal, so that possession alone is not sufficient, since the thing itself does not lie in possession but in agreement; therefore a man cannot claim a title to a watercourse *but by deed, and under seal*.' *Bolton v. The Bishop of Carlisle* (c) is at variance with the position laid down by Lord Chief Baron Gilbert, that the

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(c) (1793), 2 H. Bl. 259.



*Hewlins v.  
Shippam.*

party fails if the seal be torn off the deed. It was decided in that case that, if the deed be destroyed, other evidence may be given to show that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in that case. In *Monk v. Butler* (f), where the plaintiff in replevin answered an avowry for damage feasant by a plea of licence from a commoner who had right for twenty beasts, it was objected that, if the commoner could license, he could not do so without deed; and of that opinion was the whole Court. In *Rumsey v. Rawson* (g) the objection to such a licence on the account of its not being stated to be by deed, after verdict for the plaintiff on a collateral issue, was overruled, because the licence was only to take the profit unicâ vice, and because no estate passed by it. Yet in a subsequent case of *Hoskins v. Robins* (h) a similar objection was overruled, not on the ground that a parol licence would be sufficient, but on the ground that the objection to the mode of pleading the licence was waived by an issue on a collateral point, and that after verdict on such issue it must be taken that the licence was by deed; but, according to the report in Saunders, Hale, C. J., and the Court seemed to be of opinion that the licence could not be granted without deed. In *Harrison v. Parker* (i), where liberty and licence, power and authority, were granted to the plaintiff and his heirs to build a bridge across a river, from plaintiff's close to a close of Sir George Warren, and liberty and licence to plaintiff to lay the foundations of one end on Sir G.'s close, the grant was by deed. And in *Fentiman v. Smith* (k), where the plaintiff claimed to have passage for water by a tunnel over defendant's land, Lord Ellenborough lays it down distinctly: 'The title to have the water flowing in the tunnel over defendant's land could not pass by parol licence without deed.' Upon these authorities we are of opinion that, although a parol licence might be an excuse for a trespass till such licence were countermanded, that a right and title to have passage for the water, for a freehold interest, required a deed to create it; and that, as there has been no deed in this case, the present action, which is founded on a right and title, cannot be

(f) (1620), Cro. Jac. 574.

(g) (1681), 1 Vent. 18, 25.

(h) (1683), 1 Vent. 123, 163; 2 Saund.

327.

(i) (1805), 6 East, 154; 8 R. R. 434.

(k) (1803), 4 East, 107; 7 R. R. 533.

supported. The case of *Winter v. Brockwell* (l), which was relied upon on the part of the plaintiff, appears clearly distinguishable from the present. All that the defendant there did, he did *upon his own land*. He claimed no right or easement upon the plaintiff's. The plaintiff claimed a right and easement against him, viz., the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was that, as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb v. Paternoster* (m), *Wood v. Lake* (n), and *Taylor v. Waters* (o), were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. These, therefore, cannot be considered as authorities upon the point; and on these grounds, therefore—that the right claimed by the declaration is a freehold right; and that, if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed—we are of opinion that the nonsuit was right, and that the rule ought to be discharged."

*Hewlins v.  
Shippam.*

In *Bryan v. Whistler* (p), the right to be buried in a particular vault was held to be an easement capable of being created by deed only; and therefore a parol agreement not under seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity.

*Bryan v.  
Whistler.*

In an old case, which does not appear to have been adverted to in more recent decisions, it was held that a parol licence could not confer an easement to carry on a noisy trade. In *Bradley v. Gill* (q), the plaintiff brought an action on the case for a nuisance occasioned by the recent erection of a smith's forge and shop so near to the plaintiff's house that the plaintiff and his family

*Bradley v.  
Gill.*

(l) (1807), 8 East, 309; 9 R. R. 454.  
(m) (1820), Palm. 71; S. C., 2 Roll.  
Rep. 152; Foph. 151.

(n) (1751), Sayer, 3; [infra, p. 55 n.]

(o) (1817), 7 Taunt. 374; 18 R. R. 499.  
(p) (1828), 8 B. & C. 288; S. C., 2  
Man. & Ry. 318; 32 R. R. 389.

(q) (1688), 1 Lutw. 69.

*Bradley v.  
Gill.*

were disturbed by the noise of the defendant's business. The defendant pleaded that he had carried on the trade of a blacksmith for twenty years, and that the plaintiff advised him to come and live in the said house and carry on his trade there, by reason whereof he came to the said house and built there a convenient room to erect a smith's forge, traversing the erection of any other smith's shop. The opinion of the Court was that the action lay, and that the plea was no answer to the declaration, and that the traverse was idle; but the defendant, by consent, had liberty to amend his plea.

*Brown v.  
Windsor.*

In *Brown v. Windsor* (r), the action was brought for withdrawing support from the plaintiff's house; the evidence of right to the support claimed consisted in proof of a parol permission on the part of the then owner of the defendant's property to the plaintiff, to rest his building on a pine-end wall standing thereon; under this permission the support had been enjoyed for twenty-six years. The plaintiff recovered; and it was afterwards objected that there could not be, by law, such an easement as the right to support for a house in alieno solo; but supposing that such an easement could be acquired, no objection whatever was made to the mode of its acquisition; nor was any question raised as to whether an enjoyment, commencing under a licence, would confer an easement. The decision of the Court cannot, therefore, be considered as an authority upon this subject; nor does it appear to have ever been treated as such in the later decisions of the Courts upon this point.

*Liggins v.  
Inge.*

In *Liggins v. Inge* (s) it appeared that the predecessor of the plaintiff, who was entitled to a flow of water to his mill over the defendants' land, by a parol licence authorized the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working of the plaintiff's mill; subsequently the plaintiff complained to the defendants of the injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir; and, upon a refusal on the part of the defendants to do this, an action was brought. Tindal, C. J., in his judgment, enters fully into the question of the validity of parol licences:—

“It will be unnecessary, on the present occasion, to consider

(r) (1830), 1 Cr. & J. 20.

(s) (1831), 7 Bing. 682; S. C., 5 M. & P. 712; 33 R. R. 615.

more than one of the questions which have been argued at the Bar, viz. whether the present action, upon the facts stated in the award of the arbitrator is maintainable against the defendants.

*Liggins v  
Inge.*

“The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff’s mill in the manner it had been formerly accustomed to do. It appeared in evidence before the arbitrator, that the bank of the river which had been cut down was the soil of the defendants, and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, at their expense, in the year 1822, under a parol licence to them given for that purpose by the plaintiff’s father, the then owner of the mill; and that, in the year 1827, the plaintiff’s father represented to the defendants that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition, with which requisition the defendants had refused to comply.

“The question, therefore, is whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the licence, is such a wrong done on the part of the defendants as to make them liable to this action.

“The argument on the part of the plaintiff has been that such parol licence is, in its nature, countermandable at any time, at the pleasure of the party who gave it; that, to hold otherwise, would be to allow to a parol licence the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff’s mill, which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor, since the Statute of Frauds, as being ‘an interest in, to, or out of lands, tenements and hereditaments.’

“If it were necessary to hold that a right or interest in any part of the water, which before flowed to the plaintiff’s mill, must be shown to have passed from the plaintiff’s father to the defendants under the licence, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow; for it cannot be denied that the right to

*Liggins v.  
Inge.*

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the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by a parol licence. But we think the operation and effect of the licence, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the licence, although such licence is countermanded: and, consequently, that they are not liable to an action as wrongdoers for persisting in such refusal.

“The parol licence, as it is stated in the award of the arbitrator, was a licence to cut down and lower the bank, and to erect the weir. Strictly speaking, if the licence was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken that the object and effect of such licence was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations. We do not, however, consider the object, and still less the effect, of the parol licence to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment on the part of the plaintiff's father that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

“Water flowing in a stream, it is well settled, by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined, ‘things, the

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Inge.*

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property of which belong to no person, but the use to all.' And, by the law of England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates against any other. *Bealey v. Shaw* (t). And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become publici juris by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return; could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished; or that he could be compellable to pull down his mill, if the former mill owner should afterwards change his determination, and wish to rebuild his own? In such a case it would undoubtedly be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, that is, if he had licensed the other party to erect a mill, the same inference must follow with greater certainty. Or, suppose A. authorizes B., by express licence, to build a house on B.'s own land, close adjoining to some of the windows of A.'s house, so as to intercept part of the light; could he afterwards compel B. to pull the house down again, simply by giving notice that he countermanded the licence? Still further, this is not a licence to do acts which consist in repetition, as to walk in a park, to use a carriage-way, to fish in the waters of another, or the like; which licence, if countermanded, the party is but in the same situation as he was before it was granted; but this is a licence to construct a work, which is attended with expense to the party using the licence; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a licence to do some-

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(t) (1805), 6 East, 208; 8 R. R. 466.

*Liggins v.  
Inge,*

thing that in its own nature seems intended to be permanent and continuing; and it was the fault of the party himself, if he meant to reserve the power of revoking such licence, after it was carried into effect, that he did not expressly reserve that right when he granted the licence, or limit it as to duration. Indeed, the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

"Upon principle, therefore, we think the licence, in the present case, after it was executed, was not countermandable by the person who gave it; and, consequently, that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter v. Brockwell* (u), which rests on the judgment in *Webb v. Paternoster* (x). We see no reason to doubt the authority of that case, confirmed as it has since been by the case of *Tayler v. Waters* (y) in this court, and recognized as law in the judgment of Mr. Justice Bayley, in the case of *Heulins v. Shippam*, in the Court of King's Bench."

*Cocker v.  
Cowper.*

In *Cocker v. Cowper* (z) the doctrine laid down in *Heulins v. Shippam* was fully recognized. In that case an action was brought for stopping up a watercourse. It appeared from the award of the arbitrator, that the channel in question consisted of a drain and tunnel, which had been constructed in the defendant's land by the plaintiff, in the year 1815, with the verbal consent of the then tenant and of the defendant, and that the water had flowed through it up to the year 1833, when, upon the plaintiff's refusal to pay for the use of the water, the defendant diverted the channel. The Court of Exchequer were clearly of opinion that the plaintiff was not entitled to recover. "With regard to the question of licence," said the Court, "the case of *Heulins v. Shippam* is decisive to show that an easement like this cannot be conferred unless by deed" (a).

*Bridges v.  
Blanchard.*

In *Bridges v. Blanchard* (b) this point was raised in argument,

(u) (1807), 8 East, 308; 9 R. R. 454.

(x) (1620), Palmer, 71; S. C., 2 Roll. Rep. 152; Poph. 151.

(y) (1817), 7 Taunt. 383; S. C., 2 Marsh. 560; 18 R. R. 499.

(z) (1834), 1 C. M. & R. 418; 40 R. R. 626.

(a) See also *Bryan v. Whistler* (1828), 8 B. & C. 288; 32 R. R. 389.

(b) (1834), 1 A. & E. 536; 40 R. R. 362.

but not decided by the Court, as it appeared that no licence had, in fact, been given.

*Bridges v.  
Blanchard.*

In *Wallis v. Harrison and others* (c) an action was brought by the reversioner, for digging up the soil and making embankments and a railway over land in the occupation of his tenant. The defendant, among other pleas, pleaded, "that before the close in which, &c., became the plaintiff's property, the Dean and Chapter of Durham, being seised in fee of the said close, agreed with the defendants that they should have licence, liberty, power and authority to enter upon the said close, and to form, make and maintain certain roads, &c.: and that the said Dean and Chapter should ratify and confirm the same to the defendants: and that before the plaintiff had any interest in the said close, the said Dean and Chapter gave and delivered to the defendants, at their request, possession of the said way-leave, &c., over which the said roads now are, and at the same time when, &c., had been constructed, with leave, licence, authority and power to the defendants to enter and set out the same; whereupon, before, &c. they entered and set out the same": the plea then alleged an indenture by which the Dean and Chapter granted and demised, and granted, ratified and confirmed, unto the defendants such full liberty, &c., and averred that the defendants, by virtue of such leave, &c., and such indenture, had made the road, and unavoidably committed the said trespasses. To this plea the plaintiff demurred on the ground that the right of making the road was a matter which lay in grant, and could only be conferred by deed and not by parol, and the deed mentioned in the plea, as it appeared on oyer, did not amount to a confirmation of any prior licence by deed. The Court held the plea to be bad, as such a licence might be countermanded at any time by the owner of the land who granted it, and at all events could not be binding on his transferee.

*Wallis v.  
Harrison.*

Lord Abinger, C. B., said, in delivering judgment, "Then, treating it as a plea of licence, I think it is bad on general demurrer, because a mere parol licence to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed, that if a man out of kindness to a neighbour allows him to pass over his land, the transferee of that land is bound to



*Wallis v.  
Harrison.*

do so likewise. But it is said that the defendant should have had notice of the transfer. This is new law to me. A person is bound to know who is the owner of the land upon which he does that which, *prima facie*, is a trespass. Even if this were not so, I think the defendants ought, in excuse of their trespass, to have pleaded the fact that they had no notice of the transfer. It is true it would be the assertion of a negative. But I think this would be one of those cases where, to make a title or excuse good, a negative should be shown on the pleadings, even if the proof of the affirmative might be on the opposite party. As to the case of *Webb v. Paternoster*, the grant of the licence to put the haystack on the premises was in fact a grant of the occupation by the haystack, and the party might be considered in possession of that part of the land which the haystack occupied, and that might be granted by parol." And Parke, Baron, added, "Then with regard to the licence, the plea is bad in substance. We are not called upon in this case to consider, whether a licence to create or make a railroad, granted by a former owner of the soil, is countermandable after expense has been incurred by the licensee, which was the question in *Winter v. Brockwell*; for it is not alleged that there has been any expense incurred in consequence of the licence, and therefore it remains executory; and I take it to be clear, that a parol executory licence is countermandable at any time; and if the owner of land grants to another a licence to go over or do any act upon his close, and then conveys away that close, there is an end to the licence; for it is an authority only with respect to the soil of the grantor; and if the close ceases to be his soil, the authority is instantly gone. *Webb v. Paternoster* is very distinguishable from this case, for there the licence was executed, by putting the stack of hay on the land; the plaintiffs there had a sort of interest against the licenser and his assigns; but a licence executory is a simple authority excusing trespasses on the close of the grantor, as long as it is his and the licence is uncountermanded, but ceases the moment the property passes to another" (d).

Result of  
authorities.

The result of the above cases appears to be this—that a man may,

(d) [See *Raffry v. Henderson* (1851), 17 Q. B. 574; 85 R. R. 571, where the plaintiff claimed a right to enter a house in the possession of the defendant for the purpose of removing fixtures, under a licence given for that purpose by the lessor, who demised the house to the

defendant subsequently to the giving of the licence; and *Coleman v. Foster* (1856), 1 H. & N. 37, in which a licence to enter a playhouse was set up against a subsequent lessee of the playhouse: the attempts in both cases were unsuccessful.]

in some cases, by parol licence, relinquish a right which he has acquired in addition to the ordinary rights of property, and thus restore his own and his neighbour's property, to their original and natural condition (e); but he cannot, by such means, impose any burthen upon land in derogation of such ordinary rights of property (f)—as, for instance, a parol licence will be valid to build a wall in front of his ancient windows, while a similar permission to turn a spout on his land from a neighbouring house will be invalid and revocable; but it would seem, in order that a parol licence should have this effect, the act licensed should be executed, and the necessary consequence of such execution should be, per se, the extinguishment of the right; for the cases do not appear to furnish any authority for saying, that where the extinguishment of an easement would depend upon a repetition of the licensed acts, a parol licence would be sufficient to effect it; and, indeed, where the acts from their nature lie in repetition, such licence could not be executed.

Result of  
authorities.

This doctrine, that an easement may be extinguished by an executed authority to a man to do an act on his own land, the necessary consequence of which will be such extinguishment, coincides with the provision of the civil law:—"If I have the right of discharging my eaves' dropping into your area, and I authorize you to build in this area, I lose my right of discharge; and so, if I have a right of way over your property, and I authorize you to do anything in the place over which my right of way exists, I lose my right of way" (g).

Concordance  
of the civil  
law.

As to the case of *Tayler v. Waters*, not only are its general positions overruled by the more recent decisions of *Heulins v. Shippam* and *Cocker v. Couper*, but it is in itself open to the objection of depending upon the two cases already adverted to, and on a total misconception of the case of *Winter v. Brockwell*. Gibbs, C. J., evidently overlooks the important distinction between a licence to do a thing upon a man's own land and a licence to do something on the land of the licenser; the latter was the case then before him, whereas *Winter v. Brockwell* was the former.

Result of  
authorities.

"*Winter v. Brockwell*," said Bayley, J., in delivering the

(e) [See post, Part V. Chap. II. Sects. 2, 3, on the extinguishment of easements.]

(f) [See the following section as to the effect in equity of such cases.]

(g) Si stillicidii immittendi jus ha-

beam in aream tuam, et permisero jus tibi in eâ areâ edificandi, stillicidii immittendi jus amitto; et similiter si per tuum fundum via mihi debeat, et permisero tibi in eo loco per quem via mihi debetur, aliquid facere, amitto jus viæ. —Dig. 8, 6, 8, Quem serv. amit.

Result of  
authorities.

judgment of the Court in *Hewlins v. Shippam*, "was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which *but for an easement of the plaintiff's*, such grantee would have had a clear right to use it."

The whole current of decisions is in favour of the view here taken, with the exception of *Tayler v. Waters*, and the earlier cases of *Webb v. Paternoster* and *Wood v. Lake*, relied upon by the C. J. Gibbs in his judgment. In *Webb v. Paternoster* a parol licence had been given to the plaintiff to lay a stack of hay on the land of the defendant's lessee for a reasonable time; the lessee turned his cattle upon the land, and for this the action was brought. The decision of the Court in favour of the defendant went on the ground that a reasonable time had expired; and the observations of the Court were, consequently, altogether extrajudicial. In *Wood v. Lake* a parol licence was given to stack coals on defendant's land for seven years, and the Court of King's Bench held that such licence could not be revoked at the end of three years. It seems impossible to reconcile either the dictum in *Webb v. Paternoster*, or the decision of the Court in *Wood v. Lake*, with the more recent decision of the Court of King's Bench in *Rex v. Horndon-on-the-Hill (h)*, in which a settlement was claimed in respect of a cottage built on the waste of the manor by the parol licence of the lord. It was there urged in argument, "that it was unreasonable that, after a party has been led to incur expense in consequence of having obtained a licence from another, that the other should be permitted to recall his licence, and treat him as a trespasser; for which reason it was laid down that a licence executed is not countermandable, but only when it is executory." But Lord Ellenborough said, "A licence is not a grant, but may be recalled immediately; and so might this licence the day after it was granted."

But, indeed, authority is hardly necessary to countervail these two cases, as in neither, as was observed by the Court of King's Bench in *Hewlins v. Shippam*, does it appear that the objection was taken—that the right lay in grant, and therefore could not pass without deed; in addition to which it may be observed, that the case in *Sayer* is of doubtful authority (*i*). Mr. Starkie (*k*) observes,

(A) (1816), 4 M. & Sel. 562.

(i) Sugden's V. & P. 80, 9th ed.; [123,

14th ed.]

(A) Evid. vol. 2, 2nd ed., p. 342, n. f.

"that the interest conferred in this case amounted to a lease, inasmuch as the party was to have the sole use of that part of the close on which he was to stack his coals."

Result of  
authorities.

In *Wallis v. Harrison*, Baron Parke adverted to *Winter v. Brockwell* as raising the question, whether "where a licence has been executed, and expense incurred by the licensee in so doing, it would be countermandable, although the easement was to be enjoyed in the land of the licensor." This point was not judicially before the Court in *Wallis v. Harrison*; nor were the cases of *Hewlins v. Shippam* and *Cocker v. Couper* alluded to; in both of which the licence was held to be revocable, although it had been executed, and expense incurred by the licensee, acting under the express permission of the owner of the soil.

[Subsequently to *Wallis v. Harrison*] all the authorities on the subject [were] reviewed by the Court of Exchequer in the case of *Wood v. Leadbitter* (1). The above doctrine was recognized to the fullest extent. The judgment clearly and authoritatively points out the different effect of a licence and a grant; and removes any doubt that may have existed as to the necessity of a deed to create an easement by express agreement. "This was an action," said Alderson, B., in delivering the judgment of the Court, "tried before my brother Rolfe at the sittings after last Trinity term. It was an action for an assault and false imprisonment. The plea (on which alone any question arose) was that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglintoun, and the defendant, as the servant of Lord Eglintoun, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. Replication, that, at the time of such removal, the plaintiff was in the said close by the leave and licence of Lord Eglintoun. The leave and licence was traversed by the defendant, and issue was joined on that traverse. On the trial it appeared that the place from which the plaintiff was removed by the defendant was the inclosure attached to land surrounding the great stand on the Doncaster racecourse: that Lord Eglintoun was steward of the races there in the year

*Wood v.  
Leadbitter.*

(1) (1845), 13 M. & W. 838; 67 R. R. 831; see also *Bird v. Higginson* (1837), 6 A. & E. 824. "Whether *Wood v. Leadbitter* is still good law, having regard to *Walsh v. Lonsdale*, is very doubtful." Per Cozens-Hardy, J., in *Lowe v. Adams*, [1901] 2 Ch. 600. It is conceived, however, that this expression of the learned

judge refers only to the fact that since the Judicature Act, 1873 (see sect. 25), the rules of equity (see post, p. 63) prevail, and it is submitted that the authority of *Wood v. Leadbitter* remains unshaken for the purpose for which it is cited in the text.

Wood v.  
Leadbitter.

1843; that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand, and the enclosure surrounding it, and to remain there every day during the races. These tickets were not signed by Lord Eglintoun, but it must be assumed that they were issued with his privity. It further appeared, that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843, and was there or in the inclosure while the races were going on, and while there, and during the races, the defendant, by the order of Lord Eglintoun, desired him to depart, and gave him notice that if he did not go away force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket. The plaintiff refused to go, and thereupon the defendant, by order of Lord Eglintoun, forced him out, without returning the guinea, using no unnecessary violence.

“My brother Rolfe, in directing the jury, told them, that, even assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the inclosure, and that, if the jury were satisfied that notice was given by Lord Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of the removal, on the place in question *by the leave and licence of Lord Eglintoun*. On this direction the jury found a verdict for the defendant. In last Michaelmas Term Mr. Jervis obtained a rule nisi to set aside the verdict for misdirection, on the ground that, under the circumstances, Lord Eglintoun must be taken to have given the plaintiff leave to come into and remain in the inclosure during the races; that such leave was not revocable, at all events without returning the guinea; and so that, at the time of the removal, the plaintiff was in the enclosure by the leave and licence of Lord Eglintoun. Cause was shown during last term, and the question was argued before my brothers Parke and Rolfe, and myself; and on account of the conflicting authorities cited in the argument, we took time to consider our judgment, which we are now prepared to deliver.

"That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established that it would be mere pedantry to cite authorities in support. All such inheritances are said emphatically to lie in *grant*, and not in livery, and to pass by mere delivering of the *deed*. In all the authorities and text-books on the subject, a *deed* is always stated or assumed to be indispensably requisite.

*Wood v.  
Leadbitter.*

"And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter: a right of common, for instance, which is a *profit à prendre*, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land,—it is a right of way and something more: and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues, that he is not driven to claim the right in question strictly as *grantee*. He contends that, without any grant from Lord Eglintoun, he had licence from him to be in the close in question at the time when he was turned out, and that such licence was, under the circumstances, irrevocable. And for this he relies mainly on four cases, which he considers to be expressly in point for him, viz., *Webb v. Paternoster*, reported in five different books, namely, Palmer, 71; Roll. 143, 152; Noy, 98; Popham, 151; and Godbolt, 282; *Wood v. Lake (m)*, *Taylor v. Waters (n)*, and *Wood v. Manley (o)*.

"As the argument of the plaintiff rested almost entirely on the authority of these four cases, it is very important to look to them minutely, in order to see the exact points which they severally decided.

(m) (1751), Sayer, 3.

(n) (1817), 7 Taunt. 374; 18 R. R. 499.

(o) (1839), 11 A. & E. 30; 3 Per. & D. 5.

*Wood v.  
Leadbitter.*

"Before, however, we proceed to this investigation, it may be convenient to consider the nature of a licence, and what are its legal incidents. And, for this purpose, we cannot do better than refer to Lord C. J. Vaughan's elaborate judgment in the case of *Thomas v. Sorrell*, as it appears in his Reports. The question there was as to the right of the Crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners' Company to do certain acts notwithstanding those statutes.

"In the course of his judgment the Chief Justice says (p), 'A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing my wood, and warming him, they are licences; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or licence may destroy and alter property.'

"Now, attending to this passage, in conjunction with the title 'Licence,' in Brooke's Abridgement, from which, and particularly from paragraph 15, it appears that a licence is in its nature revocable, we have before us the whole principle of the law on this subject. A mere licence is revocable: but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

"It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a

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(p) Vaughan, 351.

*Wood v.  
Leadbitter.*

nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a licence by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by Chief Justice Vaughan, a licence not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land: and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it: he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and, if it did, then the licence would be irrevocable.

“Having premised these remarks on the general doctrine, we will proceed to consider the four cases relied on by Mr. Jervis for the plaintiff. The first was *Webb v. Paternoster*. That, as appears from the report in Rolle, was an action of trespass, brought against the defendant for eating, by the mouths of his cattle, the plaintiff's hay. The defendant justified under Sir William Plummer, the owner of the fee of the close in which the hay was, averring that Sir W. Plummer leased the close to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied, that, before the making of the lease, Sir W. Plummer had licensed him to place the hay on the close till he could conveniently sell it, and that before he could conveniently sell it, Sir W. Plummer leased the land to the defendant. The defendant demurred to the replication.

“From the arguments, as given in Rolle, it appears that the plaintiff's counsel, who was first heard, contended, first, that the licence, being a licence for profit and not merely for pleasure, and being also for a certain time only, namely, till he could sell his hay, was not revocable: and, secondly, even if the licence



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was revocable, still that the lease to the defendant was an implied, and not an *express* revocation, and therefore was inoperative against him without notice; and for this he referred to *Mallory's Case* (q). To this latter proposition the Court appears to have assented; but Dodderidge, J., suggested, that, even if the licence was in force, still the licenser did not by such a licence preclude himself, nor, consequently, his tenant, from turning cattle on the land, and that the *licensee* ought to have taken care to protect the hay from the cattle. As to this, however, the Chief Justice expressed a doubt. The defendant's counsel was heard some days afterwards, and he alleged that it appeared by the record, that the plaintiff had had two years to sell his hay before the defendant's cattle had eaten it; and he argued that the Court would say, as matter of law, that this was more than reasonable time; and to this the Court assented. The plaintiff's counsel, in reply, reverted to the distinction between the licence for profit and a licence for pleasure; but Dodderidge denied it, and said that a licence to dig gravel, though a licence for profit, is revocable; and he said that the true distinction was between a *mere* licence, and a licence *coupled with an interest*. Judgment was eventually given for the defendant, on the ground that the plaintiff had had more than reasonable time to sell the hay.

"It will be seen, therefore, that the only two points decided were, first, that the question of reasonable time was for the Court, and not for the jury; and, secondly, that two years was more than a reasonable time. The decision, therefore, itself has no bearing on the point for which it was cited; and the only support which the case affords to the doctrine contended for by the present plaintiff is what is said, in the report of the case in Popham, to have been agreed by the Court, namely, that a licence for profit for a term certain is not revocable; a proposition to which, with the qualification we have already pointed out, we entirely accede. It is, moreover, by no means certain that the licence in *Webb v. Paternoster* was not a licence under seal. The defendant's counsel appears, from the report in Rolle, to speak of the plaintiff as *grantee* of the liberty to stack hay, &c.; a form of expression not very appropriate, if used in respect of a party who had a mere parol licence; and the Chief Justice, according to the report in Popham and Palmer, says that the

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(q) (1738), 5 Rep. 111.

plaintiff had an interest which charged the land, into whose hands soever it should come. And Dodderidge, J., according to the report in Palmer, arguing that the lessee certainly might turn his cattle into his own field, and was not bound to stop their mouths, says it was folly of the plaintiff that he did not, *together with the licence, take a covenant that it should be lawful for him to fence the hay with a hedge.* From these expressions (and there are others in the various reports of the case having a similar aspect), it certainly seems possible that the licence was under seal; and then the only point would be that which alone was in fact decided, namely, whether, supposing the plaintiff to have acquired by grant a right to stack his hay on the land for a limited time, that limited time had expired. Even supposing the licence to have been a mere parol licence, yet the strong probability is that Webb had purchased the hay from Sir W. Plummer as a growing crop, with liberty to stack it on the land, and then the parol licence might be good as a licence coupled with an interest. Be this, however, as it may, the decision, as we have already pointed out, has very little, or rather no bearing on the case before us; and the judgment of Dodderidge, J., as given both in Rolle and Palmer, is in strict accordance with what was afterwards laid down by Vaughan, C. J., and which we consider to be consonant both to principle and authority.

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“The next decision in order of time is that of *Wood v. Lake*, in Sayer, p. 3. There the defendant had, by a parol agreement, given liberty to the plaintiff to stack coals on the defendant's land for a term of seven years. After the plaintiff had enjoyed this privilege for three years, the defendant locked up the gate of the close. No report is given in Sayer of the arguments at the bar. But from a MS. report of the same case, referred to by Gibbs, C. J., in the case of *Taylor v. Waters*, and which MS. we have had an opportunity of consulting, through the kindness of the representatives of the late Mr. Justice Burrough (r), it

(r) The following is a copy of the report in the MS. volume of Justice Burrough.

CASE.—A parol agreement that the plaintiff should have liberty of laying and stacking of coals upon defendant's close, for seven years. Afterwards, defendant forbids plaintiff to lay any more coals there, and shuts up his gates. Defendant says, that plaintiff was but

tenant at will. Quære, if this was an interest within the description of the Statute of Frauds.

“Serjeant Booth.—This is but a personal licence or easement: 1 Roll. Abr. 859, p. 4; Roll. Rep. 143, 152; 1 Saund. 321. A contract for sale of timber growing upon the land has been determined to be out of the statute: 1 Ld. Raym. 182. Vide the difference of a

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appears that the argument turned wholly on the point whether the privilege of stacking the coal did or did not amount to a lease; for if it did, then the defendant contended it was void after three years, under the Statute of Frauds, as not being in writing. Lee, C. J., and Denison, J., held it to be no lease, nor uncertain interest in land; but Foster, J., doubted, and desired time to consider. On the last day of term, the Court gave judgment for the plaintiff, Foster non dissentiente.

"Supposing the Court to have been right in deciding that this was not a lease (which, however, is doubted by Sir E. Sugden, see 1 V. & P., last edit. p. 139), yet no grounds are stated on which it could be held good as an easement originating merely by parol. Up to this case not a single decision is to be found giving countenance to any such proposition; and we are compelled to say, that, if the Court proceeded on the ground that the plaintiff had acquired the easement by the parol licence, we do not think it can be supported. But the case may, perhaps, have been decided on another ground. The defendant himself was the party who had agreed to give the easement to the plaintiff; and although the action is stated to have been *an action on the case*, it may have been a mere *assumpsit*—an action on the case on *promises*; and in such an action the plaintiff would certainly be entitled to recover, if the

licence and a lease, 1 Lev. 194. This must be taken only as a licence, for that the coal-loaders also are to have benefit, as well as plaintiff.

"Serjeant Poole, for defendant.—Question is, if any interest in land passed by the agreement; for, if interest passed, it is within the statute, ergo void, being for longer term than three years: Bro. Licence, p. 19; *Thoms v. Seabright*, Salk. 24; *Webb v. Paternoster*, Poph. 151. A licence to enter upon and occupy land amounts to a lease. The plaintiff not confined to a particular part of the close, and might have covered the whole if he pleased; on that account it is an uncertain interest. The distinction of licence to plaintiff and his coal-loader, is nothing; he could not stack the coal himself, and it is merely vague. Easement may be of more value than the inheritance; ex. gr., way-leave.

"Lee, C. J.—If this be a lease, as it is argued, it is within the statute, and void, for not being in writing. No answer as yet is given to the case in Popham, when the stacking of hay,

which is similar, was determined to be a licence. The word *uncertain*, in the statute, means uncertainty of duration, not of quantity. Licence was not revocable, and here is no case to show this to be considered as a lease.

"Denison, J.—This seems not to be an interest, so called in the language of the law, although easements, in general speaking, may be called interests. Had the plaintiff such an interest as to have maintained a *clausum fregit*? Certainly not. If a man licences to enjoy lands for five years, there is a lease, because the whole interest passes, but this was only a licence for a particular purpose.

"Foster, J.—These interests, grounded upon licences, are valuable, and deserve the protection of the law, and therefore may perhaps have been within the intention of the words of the statute.—Desired further time for consideration: stood over.

N.B.—Afterwards, upon motion for judgment the last day of term, and gave judgment for plaintiff, Foster non dissentiente.

contract was not (and probably the Court considered it was not) a contract concerning land, within the 4th section of the Statute of Frauds (s).

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"The next case on which the plaintiff relies is *Tayler v. Waters*, reported in 7 Taunt. 374. It was an action by the plaintiff against the door-keeper of the Opera-house, for preventing him from entering the house during the performance of an opera. It appeared that one W. Tayler, being in possession of the Opera-house, as lessee for a long term of years, by a deed, dated the 24th of August, 1792, assigned his interest therein to trustees, on various trusts, for creditors and other claimants, and ultimately in trust for himself. After the execution of this deed, Tayler continued in possession by the permission of the trustees, and he carried on and managed the affairs of the theatre. In March, 1799, he by deed, granted to one Gourgas, for a valuable consideration, six silver tickets, entitling the holders to admission to the theatre. One of these tickets was sold by Gourgas to the plaintiff in July, 1799, but no deed of assignment to him was executed. In 1800, Tayler's trustees took possession of the theatre. The plaintiff, however, was allowed to attend the theatre, by virtue of his ticket, until the year 1814, when the defendant Waters, as servant of the trustees, prevented him from entering the theatre; and for this obstruction the action was brought. The cause was tried before C. J. Gibbs, and a verdict found for the plaintiff, and that verdict was afterwards upheld by the Court of Common Pleas. The grounds of the judgment were, that the right under the silver ticket was not an interest in land, but a licence irrevocable to permit the plaintiff to enjoy certain privileges thereon; that it was not required by the Statute of Frauds to be in writing, and, consequently, might be granted without a deed.

"The Chief Justice, in support of that doctrine, relied on *Webb v. Paternoster*, which, he said, showed that a beneficial licence, to be exercised upon land, might be granted without deed, and could not be countermanded, at least after it had been acted on. The same case, he added, showed that the interest was not such an interest in land as was required by the Statute of Frauds to be in writing; as to which last point all doubt, if there remained any, had (he said) been removed by the case of *Wood v. Lake*.

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(s) [See *Jones v. Flint* (1839), 10 A. & E. 753; 50 R. R. 527; *Wright v. Stavert* (1860), 2 E. & E. 721.]

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“ This judgment is stated by the learned reporter to have comprised the substance of the arguments on both sides, and which, therefore, he does not give in his report. We must infer from this that the attention of the Court was not called in the argument to the principles and earlier authorities, to which we have adverted. Brooke, in his Abridgment, Dodderidge, in the case of *Webb v. Paternoster*, and Lord Ellenborough, in the case of *Rex v. Horndon-on-the-Hill* (t), all state in the most distinct manner that every licence is and must be in its nature revocable, so long as it is a mere licence. Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked licence, become irrevocable: but then it is obvious that the grant must exist independently of the licence, unless it be a grant capable of being made by parol, or by the instrument giving the licence. Now in *Taylor v. Waters* there was no grant of any right at all, unless such right was conferred by the licence itself. C. J. Gibbs gives no reason for saying that the licence was a licence irrevocable, and we cannot but think that he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been fully brought before the Court. Again, the Chief Justice is represented as saying that the interest of the plaintiff was not an interest in land within the Statute of Frauds, and that *consequently* it might be granted without deed. How the circumstance, that the interest was not an interest in land within the Statute of Frauds, showed it to be grantable without deed, we cannot discover. The precise point decided in *Webb v. Paternoster* is not adverted to, and it is assumed, without discussion, that the licence there must have been a parol licence, and a naked licence, unconnected with an interest, capable of being created by parol. This action was not, as it may have been in *Wood v. Lake*, an action founded on the contract. It was an action on the case for the obstruction, and was founded on the supposition that an actual right to enter and remain in the theatre had vested in the plaintiff, under the licence conferred by the silver ticket. With all deference to the high authority from which the judgment in *Taylor v. Waters* proceeded, we feel warranted in saying that it is to the last degree unsatisfactory:—an observation which we have the less hesitation in making, in consequence of its soundness

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(t) (1816), 4 M. & Sel. 562.

having obviously been doubted by the Court of King's Bench and Mr. Justice Bayley, in the case of *Hewlins v. Shippam*.

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"The fourth and last case relied on by Mr. Jervis was the recent case of *Wood v. Manley*, in the Queen's Bench (u). That was an action for trespass quare clausum fregit; plea, that defendant was possessed of a large quantity of hay being on the plaintiff's close, and that by leave of plaintiff he entered on the close in question to remove it. Replication, de injuriâ. It was proved at the trial that the hay in question was sold in January, 1838, by the plaintiff's landlord, who had seized it as a distress for rent. The conditions of the sale were that the purchaser of the hay might leave it on the close until Lady-day, and might in the meantime come on to the close from time to time, as often as he should see fit, to remove it. *These conditions were assented to by the plaintiff.* The defendant became the purchaser, and afterwards, and before Lady-day, the plaintiff locked up the close. The defendant broke open the gate in order to remove the hay. A verdict was found for the defendant, Erskine, J., telling the jury that the licence to come from time to time to remove the hay was irrevocable. Mr. Crowder moved to set aside this verdict, on the ground that the licence was necessarily revocable, and was in fact revoked. But the Court of Queen's Bench refused to grant a rule, and, we think, quite rightly. This was a case, not of a mere licence, but of a licence coupled with an interest. The hay, by the sale, became the property of the defendant, and the licence to remove it became, as in the case of the tree and the deer, put by C. J. Vaughan, irrevocable by the plaintiff; and the rule was properly refused. The case was analogous to that of a man taking my goods, and putting them on his land, in which case I am justified in going on the land and removing them: *Vin. Abr. Trespass, (H) a 2, pl. 12*: and *Patrick v. Colerick* (x).

"It appears, therefore, that the only authority necessarily supporting the present plaintiff in the proposition for which he is contending, is the case of *Taylor v. Waters*, in which the real difficulty was not discussed, nor even stated. It was taken for granted that, if the Statute of Frauds did not apply, a parol licence was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right in nature

(u) (1839), 11 Ad. & E. 30; 3 Per. & D. 5.

(x) (1838), 3 M. & W. 483; 49 R. R. 696.

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of an easement, was by some inadvertence kept entirely out of sight; and for these reasons, even if there had been no conflicting decisions, we should have thought that case to be a very unsafe guide in leading us to a decision on an occasion where we were called on to lose sight of the ancient landmarks of the common law.

"We are not, however, driven to say that we shall not disregard that case *merely* on principle. Giving it the full weight of judicial decision, it is met by several others, which we must entirely disregard, before we can adopt the argument of the plaintiff. In the cases of *Fentiman v. Smith* (y), and *Rex v. Horndon-on-the-Hill* (z), which were before *Taylor v. Waters*, Lord Ellenborough and the Court of King's Bench expressly recognized the doctrine that a licence is no grant, and that it is in its nature necessarily revocable, and the further doctrine that, in order to confer an incorporeal right, an instrument under seal is essential. And in the elaborate judgment of the Court of King's Bench, given by Bayley, J., in *Hewlins v. Shippam* (a), the necessity of a deed, for creating any incorporeal right affecting land, was expressly recognized and formed the ground of the decision. It is true that the interest in question in that case was a freehold interest, and on that ground Bayley, J., suggests that it might be distinguished from *Taylor v. Waters*; but in an earlier part of that same judgment, he states, conformably to what is the clear law, that, in his opinion, the quantity of interest made no difference; and the distinction is evidently adverted to by him, not because he entertained the opinion that it really was of importance, but only in order to enable him to decide that case without, in terms, saying that he did not consider the case of *Taylor v. Waters* to be law. The doctrine of *Hewlins v. Shippam* has since been recognized and acted upon in *Bryan v. Whistler* (b), *Cocker v. Cooper* (c), and *Wallis v. Harrison* (d), and it would be impossible for us to adopt the plaintiff's view of the law, without holding all those cases to have been ill decided. It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference;

(y) (1803), 4 East, 107; 7 R. R. 533.

(z) (1816), 4 M. & Sel. 565.

(a) (1826), 5 B. & C. 222; 31 R. R. 757.

(b) (1828), 8 B. & C. 288; 32 R. R. 389.

(c) (1834), 1 C. M. & R. 418; 40 R. R. 626.

(d) (1838), 4 M. & W. 538.

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whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil; and it is sufficient, on this point, to say that in several of the cases we have cited, (*Heulins v. Shippam*, for instance, and *Bryan v. Whistler*;) the alleged licence had been granted for a valuable consideration, but that was held not to make any difference. We do not advert to the cases of *Winter v. Brockwell* (e) and *Liggins v. Inge* (f), or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case now before us, and were in fact admitted not to bear upon it.

"In conclusion, we have only to say, that, acting upon the doctrine relative to licences, as we find it laid down by Brooke, by Mr. Justice Dodderidge, and by C. J. Vaughan, and sanctioned by *Heulins v. Shippam*, and the other modern cases proceeding on the same principle, we have come to the conclusion that the direction given to the jury at the trial was correct, and that this rule must be discharged.—Rule discharged" (g).

[In the case of *Perry v. Fitzhove* (h), A., having a right of common, appurtenant to Blackacre, over land called the Heath, gave B. a parol permission to build a house on the Heath. B. built in pursuance of the licence. Blackacre afterwards came by assignment to C., who pulled down the building; and upon an action of trespass being brought by B., C. pleaded, inter alia, a justification under an immemorial right of common appurtenant to

*Perry v.  
Fitzhove.*

(e) (1807), 8 East, 308; 9 R. R. 454.

(f) (1831), 7 Bing. 682; 33 R. R. 615.

(g) [Cf. *Adams v. Andrews* (1850), 15 Q. B. 284; *Taplin v. Florence* (1851), 10 C. B. 744; 84 R. R. 773. In *Bell v. Midland Rail. Co.* (1859), 3 De Gex & Jones, 673, coram the Lords Justices, it was attempted to apply the authority of *Wood v. Leadbitter* to a case where, an Act of Parliament having authorized the owners of lands adjoining a railway to construct branch railways or sidings so as to form continuous communication from their own lands to the railway, with a provision for the settlement by justices of any dispute as to the proper place for the sidings, the plaintiff had

constructed and used a siding at a particular spot with the assent of the company, which they afterwards attempted to revoke; the company relied upon the authority of *Wood v. Leadbitter* and the class of cases of which it is one, but without success, the Court holding that those authorities have no bearing upon such a case. Nor do they apply to the ordinary contract entered into by a railway company for the carriage of a passenger; *Butler v. Manchester, Sheffield, and Lincolnshire Rail. Co.* (1883), L. R. 21 Q. B. D. 207. Nor can they be set up by a mere wrongdoer, against the possessory right of a licensee; *Northam v. Hurley* (1853), 1 E. & B. 665.]

(h) (1846), 8 Q. B. 757; 70 R. R. 626.



*Perry v.  
Fitzhous.*

[Blackacre, over the Heath. The Court held that to that plea it was a bad replication that A. had given the licence, and that B. had built the house under that licence; on the ground that the plaintiff was setting up a grant of a freehold interest, binding the inheritance of Blackacre by restricting the right of common appurtenant to it, and that such grant must be by deed under seal. It was argued that the case fell within the principle of the authorities, as to the effect of a parol licence executed in extinguishing an easement; so that the right of common might be considered to be extinguished in the spot on which the building was erected. The judgment does not advert to the distinction between the effect of a licence operating, when acted upon, by way of extinguishment of an existing right, and one operating by way of grant of a right to interfere with that right, supposing it not to be extinguished; for it is laid down by the Court that the licence could only operate, if at all, in the last-mentioned way, which it clearly could not do. And, having regard to this, and also to the peculiar nature of a right of common appurtenant by prescription (which is in its nature entire (i), and an extinguishment of which by act of its owner in any part of the land over which it is claimed works at common law (k) an extinguishment of it over the whole), and further to the fact that it did not appear that the licensee had any interest in the land upon which he was licensed to build, the judgment cannot be said to be opposed to the authorities above referred to, as to the binding effect of a licence given by the owner of a dominant tenement to the owner of the servient, to erect some permanent structure on his land, inconsistent with the continuance of the easement. It is difficult, however, to reconcile the opinion expressed by the Court, that the doctrine of such cases as *Winter v. Brockwell* only applies as between the original licenser and the licensee, and would not bind an assignee of the former, with the interpretation of that case in the authorities already cited in this chapter, and those which will be found collected post, Part V. Chap. II. Sects. 2, 3, as to the extinguishment of easements, where the distinctions between the different kinds of easements and profits à prendre, in respect of this question, are noticed.

(i) See the distinction in this respect between a right acquired under Lord Tenterden's Act and by prescription at the common law explained in *Davies v.*

*Williams* (1857), 16 Q. B. 546.

(k) Co. Lit. 122 a; 4 Rep. 38 a; Cruise, Dig. Title XXIII., Common, §§ 43, 82.

[There is nothing in the cases cited to prevent a court of law from giving damages for a breach of a written agreement to grant a licence irrevocable for a definite period; the rule established is, that such an agreement passes no legal interest in the soil (*l*).

And a licensee whose licence is revoked is entitled to reasonable notice of the revocation (*m*).

### (b.) *Equity.*

There may be an equitable right to an easement by agreement, and without a deed. If, indeed, the agreement be voluntary, equity will not interfere to enforce it; nor will it be enforced as against a purchaser for value without notice. But, if there is an agreement to grant an easement for a good and substantial consideration, equity considers it (as between the parties to the agreement and persons taking with notice) as granted, and will either decree a legal grant or restrain a disturbance by injunction (*n*).

In *Duke of Devonshire v. Eglin* (*o*) the defendant verbally consented to the plaintiff's making a watercourse through his land on being paid a reasonable compensation. The watercourse was made, but no grant was executed and no sum arranged. After nine years' user the defendant stopped it up; he was restrained by decree from so doing, and it was referred to the Master to settle a proper compensation. The defence of the Statute of Frauds was answered by the part performance.

In *Moreland v. Richardson* (*p*) the plaintiffs had purchased from the trustees of a chapel graves in a burying-ground attached to the chapel, and received receipts for their purchase money stating that the graves were sold in perpetuity. The Master of the Rolls held that they were entitled to have their family vaults, and the spot on which they were situate, kept undefaced and unob-

Equitable  
right by  
agreement  
without deed.

*Duke of  
Devonshire v.  
Eglin.*

*Moreland v.  
Richardson.*

(*l*) *Smart v. Jones* (1864), 33 L. J., N. S., C. P. 154; cf. *Duke of Somerset v. Fogwell* (1826), 5 B. & C. 875; 29 R. R. 449; *Kerrison v. Smith*, [1897] 2 Q. B. 445.

(*m*) *Cornish v. Stubbs* (1870), L. R. 5 C. P. 335; *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400; *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437; *Wilson v. Tavener*, [1901] 1 Ch. 578; cf. *Lowe v. Adams*, [1901] 2 Ch. 598. Dist. *Lemmon v. Webb*, [1895] A. C. 1.

(*n*) *Francis' Maxims*, 13; Fonbl. Eq. B. 1, c. 6, s. 9. Cf. *Walsh v. Lonsdale* (1882), L. R. 21 Ch. Div. 9 (agreement

for lease); *Jones v. Watts* (1890), 43 Ch. Div. 574 (as to title on agreement for lease of easement); *Lowe v. Adams*, [1901] 2 Ch. 598 (right to shoot); *May v. Belleville*, [1905] 2 Ch. 605 (conveyance not executed); and see, as to notice, *Hervey v. Smith* (1855), 1 K. & J. at p. 394, and *Prinsep v. Belgravia Estate, Ltd.*, W. N. (1896), p. 39; and on the whole paragraph in the text, *Cooke v. Chilcott* (1876), L. R. 3 C. D. 694.

(*o*) (1851), 14 Beav. 530; 92 R. R. 201.

(*p*) (1856), 22 Beav. 596; 26 L. J., Ch. 690.

*Moreland v.  
Richardson.*

[literated, and enjoined succeeding trustees from removing, defacing, obliterating or injuring the graves and monuments belonging to the plaintiffs. The right of burial was treated as an easement.

*McManus v.  
Cooke.*

In *McManus v. Cooke* (q) the plaintiff and defendant, being owners of adjoining houses, had entered into a verbal agreement, under which a party-wall was to be pulled down and rebuilt at their joint expense, and each party was to be at liberty to make a lean-to skylight resting on the new party-wall and running up to the sill of the first-floor window of his own building. The defendant having shaped his skylight so as to show above the wall and obstruct some of the light coming to the plaintiff's skylight, Kay, J., granted an injunction, holding that the agreement was for an easement of light, and that the defence of the Statute of Frauds (if good) was answered by the plaintiff's part performance.

*Hastings v.  
North Eastern  
Rail. Co.*

In *Hastings (Lord) v. North Eastern Rail. Co. (r)*, where the owner in fee of land, by an agreement under seal agreed to grant by lease, in the form set out verbatim in the agreement, a way-leave over his land, with the right to make and use certain railways thereon, and the form of lease embodied in the agreement reserved to the grantor, his heirs and assigns, a periodical payment on coal, &c., carried over certain railways (including railways not running over land of the grantor), and gave to the grantor, his heirs and assigns, powers of distress and entry for non-payment of rent, and contained a covenant by the grantee with the grantor, his heirs and assigns, to pay the rent to him, his heirs and assigns, it was held that the interest of the grantee under the agreement (no formal lease having been executed but the grantee having entered and constructed the railways) was not a mere licence, but an incorporeal hereditament, capable of being inherited or assigned, and that the rent, whether for coal carried over the original grantor's land or not, must be regarded as payable in respect of the land leased, and was consequently payable, after the death of the original grantor, to his successor in title, as the owner of the reversion within 32 Henry VIII., c. 34, s. 1, and not to the legal personal representatives of the original owner, there being sufficient privity of estate between the owners of the land over which the way-leave was granted, and the grantee, to enable such owners to sue the grantee on the covenant for payment.

(q) (1887), L. R. 35 Ch. D. 681.  
(r) [1898] 2 Ch. 674; [1899] 1 Ch.

656; affd. sub nom. *North-Eastern Railway v. Hastings (Lord)*, [1900] A. C. 260.

[In *May v. Belleville* (s), two adjoining farms, called "White Lodge" and "Coxhill," had for many years prior to 1902 been owned by the same person, and while thus united in title, the tenants of Coxhill had, by leave (either asked or not), used a way over White Lodge. In 1902 White Lodge was sold under an agreement embodying particulars of sale under which the property had shortly before been offered at auction, in which appeared, at the foot of the description of White Lodge, the following words, "There is also reserved to the vendor, his heirs and assigns, the owners and occupiers for the time being of lots 24 and 23" (lot 24 being Coxhill), "and their servants and others authorized by them, all rights of way hitherto exercised by them in respect of such lots over any portion of this lot 27" (White Lodge). The conveyance of White Lodge to the purchaser contained a reservation to the vendor, his heirs and assigns, &c., of all rights of way theretofore exercised in respect of Coxhill and another farm over any portion of White Lodge. This conveyance was executed by the vendor, but not by the purchaser. In an action by the vendor against an assign of the purchaser, it was held by Buckley, J., that the purchaser was bound in equity by the reservation, that the Statute of Frauds did not apply, and that the assign of the purchaser necessarily had notice of the reservation, and was bound thereby, and an injunction was granted restraining the defendant from interfering with the right of way. *May v. Belleville.*

(c.) *As to the effect of Acquiescence.*

There is now a large number of cases in which an agreement to grant an easement or some other right has been inferred—or, more correctly, has been imputed to the person who is in a position to make the grant, on account of some action or inaction on his part. These cases rest on the equitable doctrine of acquiescence; but they may be referred to, for the purpose of classification, as imputed or constructive grants. Constructive grant.

The rule has been variously stated by the judges as follows:— Statements of the rule.

"This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement (t)."  
*Dann v. Spurrier.*

(s) [1905] 2 Ch. 605; cf. *Radcliffe v. Hayes*, [1901] 1 Ir. R. 101.

(t) Lord Eldon, in *Dann v. Spurrier* (1802), 7 Ves. at p. 235; 6 R. R. 119.

*Jones v. Royal  
Canal Co.*

[“To have a work erected at great expense, whether private or public, removed by this Court as a nuisance, the person complaining should have given notice not to proceed, otherwise the Court will leave the complainant to law (u).”]

*Williams v.  
Earl of Jersey.*

“A party, having an equity, loses that equity, as against another person, by permitting him to go on dealing with property in ignorance of such equity (v).”

*Duke of  
Beaufort v.  
Patrick.*

“He who stands by and encourages an act cannot afterwards complain of it, or interfere with the enjoyment of that which he has permitted to be done (x).”

*Ramsden v.  
Dyson.*

“If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

“But it will be observed that, to raise such an equity, two things are required: first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him, and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity, which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

“It follows as a corollary from these rules, or perhaps it would be more accurate to say it forms part of them, that, if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any

This statement was adopted by Lord Cranworth, V.-C., in *Rochdale Canal Co. v. King* (1851), 2 Sim. N. S. at p. 88; 89 R. R. 211; and by Romilly, M. R., in *Cotching v. Bassett* (1862), 32 Beav. at p. 111.

(u) Per Lord Manners, in *Jones v. Royal Canal Co.*, 2 Molloy's Ir. Ch. Rep. 319.

(v) Lord Cottenham, in *Williams v. Earl of Jersey* (1841), 1 Craig & Ph. at p. 96; 54 R. R. 219.

(x) Lord Romilly, M. R., in *Duke of Beaufort v. Patrick* (1853), 17 Beav. at p. 74. And so Lord Chelmsford, C., in *Somersetshire Canal v. Harcourt* (1858), 2 De G. & J. at p. 608.

[right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest; and it was his folly to expend money upon a title which he knew would or might soon come to an end (y).”

*Ramsden v.  
Dyson.*

“If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation (z).”

It is an important question, what amount or quality of encouragement or acquiescence is sufficient to give rise to the equity. When the encouragement to expenditure is active, and is accompanied either by an actual representation of the alleged grantor's intention to grant the right claimed, or by a silence which may lead to an expectation that the right will be granted, there is of course no doubt that the agreement to grant will be imputed under the rule (a). And, even although there be no active encouragement, if one lie quietly by and witness an expenditure which must be thrown away or greatly diminished in value except it be supplemented by the grant claimed, and if there be to the knowledge of the person so lying by a misconception on the part of the building owner, then the rule appears to take effect (b). But if such a notice be given to the person incurring the expenditure, or if he

What is  
acquiescence.

(y) Lord Cranworth, in *Ramsden v. Dyson* (1866), L. R. 1 H. L. at p. 140. Cf. as to the last point, *Att.-Gen. v. Baliol* (1744), 9 Mod. 407, at p. 411.

(z) Per Lord Kingsdown, in *Ramsden v. Dyson* (1866), L. R. 1 H. L. at p. 170; quoted by James, V.-C., in *Bankart v. Tennant* (1870), L. R. 10 Eq. at p. 146; *Civil Service Musical Instrument Association v. Whiteman* (1899), 80 L. T. 685; 68 L. J. Ch. 484.

(a) *Watercourse Case*, and *Short v. Taylor* (1710), 2 Eq. Ca. Abr. 522, pl. 3 (below, p. 71); *Lord Caudor v. Lewis* (1855), 1 Y. & C. Exch. in Eq. 427; *Jackson v. Cator* (1800), 5 Ves. 688; 5 R. R. 144; *Brydges v. Kilburne* (1792), cited *ibid.*; *Williams v. Earl of Jersey* (1841), 1 Craig & Phil. 91; 54 R. R. 219 (below, p. 72); *Rochdale Canal Co.*

*v. King* (1851), 2 Sim. N. S. 78; 16 Beav. 630; 89 R. R. 211 (below, p. 72); *Duke of Beaufort v. Patrick* (1853), 17 Beav. 60; *Laird v. Birkenhead Rail. Co.* (1859), Jop. 500 (below, p. 73); *Cotching v. Bassett* (1862), 32 Beav. 101 (below, p. 74).

(b) *East India Co. v. Vincent* (1710), 2 Atk. 83 (below, p. 71); *Clavering's Case*, per Lord Loughborough, 5 Ves. 690; 5 R. R. 146; *Pocell v. Thomas* (1848), 6 Hare, 300; 77 R. R. 116; *Rochdale Canal Co. v. King* (1851), *ubi sup.*; *Mold v. Wheatecroft* (1859), 27 Beav. 510; *Davies v. Sear* (1869), L. R. 7 Eq. 427 (below, p. 76); *Bankart v. Tennant* (1870), L. R. 10 Eq. 141 (below, p. 76); *Crook v. Corporation of Seaford* (1871), L. R. 6 Ch. 551. See the observations in *Blanchard v. Bridges* (below, p. 75).

What is  
acquiescence.

[possess such knowledge as must dispel any misconception as to the intentions of the person in whom the right exists, this is sufficient to prevent the equity from arising (c); and it is not necessary that the notice should be repeated though the expenditure continues (d). Acquiescence is of course inoperative without knowledge of the expenditure (e).

"It has been said," said Fry, J., in *Willmott v. Barber* (f), "that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your own legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it; but, in my judgment, nothing short of this will do."

(c) *East India Co. v. Vincent* (1740), ubi sup., per Lord Hardwicke; *Dann v. Spurrier* (1802), 7 Ves. 231; 6 R. R. 119; *Pilling v. Armitage* (1806), 12 Ves. 78, 85; 8 R. R. 295; *Durham and Sunderland Rail. v. Waven* (1840), 3 Beav. 119; 52 R. R. 56; *Ramsden v. Dyson* (1866), L. R. 1 H. L. 129. Cf. *Kenney v. Broune*, 3 Ridg. 462, 518; *Att.-Gen. v. Baliol* (1744), 9 Mad. 407, 411. The case of *Birmingham Canal Co. v. Lloyd* (1812), 18 Ves. 515; 11 R. R. 245, stands on a peculiar footing; see

*Haines v. Taylor* (1847), 2 Phill. 209; 78 R. R. 71.

(d) *Master of Clare Hall v. Harding* (1848), 6 Hare, 273; 77 R. R. 115.

(e) *Dann v. Spurrier* (1802), ubi sup.

(f) (1880), L. R. 15 Ch. D. at p. 105; repeated by the same judge in the Court of Appeal, *Russell v. Watts* (1883), L. R. 25 Ch. Div. at p. 585, and see *Civil Service Musical Instrument Association v. Whiteman* (1899), 80 L. T. 685; 68 L. J. Ch. 484.

[A company acquiescing in expenditure is as much bound by Company.  
the rule as an individual (*g*); and, although an infant incurs  
no obligation by lying by during his minority (*h*), yet, if he con- Infant.  
tinues after attaining his full age to permit expenditure to be  
incurred or rights to be lost, the equity will attach (*i*). A rever-  
sioner is as much bound by his own acquiescence as he would be if Reversioner.  
he were in possession (*k*).

With respect to the manner in which the principle will be en-  
forced, Romilly, M. R., in the case of *Bankart v. Houghton* (*l*), Rule how  
made a distinction between a person resisting an injunction on the enforced.  
ground of the acquiescence of the person asking for it, and one  
taking active steps to restrain on this ground an action at law.  
But it seems to be clear that, since the passing of the Judicature  
Acts, no such distinction exists; and the principle has been applied,  
not only as a bar to an injunction (*m*) or action at law (*n*), but as  
a ground for restraining on act inconsistent with the right  
claimed (*o*). Whether a legal grant would in any case be decreed,  
is more doubtful (*p*).

The constructive grant is of course merely an equitable right, Assign of  
and would not bind an assignee of the grantor for value without person  
notice. But, in practice, the structure or other work in respect of acquiescing.  
which the grant is claimed, would often be of such a kind that no  
person could take the property without being put on inquiry as to

(*g*) *Rochdale Canal Co. v. King* (1851),  
ubi sup.; *Laird v. Birkenhead Rail. Co.*  
(1859), Joh. 500 (below, p. 73); *Crook*  
*v. Corporation of Seaford* (1871), L. R. 6  
Ch. 551.

(*h*) Per Lord Cottenham, in *Duke of*  
*Leeds v. Earl of Amherst* (1846), 2 Phill.  
at p. 123; 78 R. R. 47.

(*i*) *Somerset Coal Canal Co. v. Har-*  
*court* (1857), 24 Beav. 571; 2 De G. &  
J. 596.

(*k*) *Duke of Beaufort v. Patrick* (1853),  
17 Beav. 60. Cf. as to a mortgagee,  
*Mold v. Wheatecroft* (1859), 27 Beav. 510.

(*l*) (1859), 27 Beav. 425 (below, p. 73).

(*m*) *Brydges v. Kilburne* (1792), cited  
5 Ves. 689; 5 R. R. 146; *Rochdale Canal*  
*Co. v. King* (1851), 2 Sim. N. S. 73; 16  
Beav. 630; 89 R. R. 211 (below, p. 72).

(*n*) *Watercourse Case*, 2 Eq. Cas. Abr.  
522 (below, p. 71); *Stiles v. Couper*  
(1748), 3 Atk. 692; *Williams v. Earl of*  
*Jersey* (1841), 1 Craig & Ph. 91 (below,  
p. 72); 54 R. R. 219; *Powell v. Thomas*  
(1848), 6 Hare, 300; 77 R. R. 116;

*Duke of Beaufort v. Patrick* (1853), 17  
Beav. 60; *Somerset Coal Canal Co. v.*  
*Harcourt* (1857), 24 Beav. 571; 2 De G.  
& J. 596; *Davies v. Sear* (1869), L. R. 7  
Eq. 427.

(*o*) *East India Co. v. Vincent* (1740), 2  
Atk. 83 (below, p. 71); *Jackson v. Cator*  
(1800), 5 Ves. 688; 5 R. R. 144; *Laird*  
*v. Birkenhead Rail. Co.* (1859), Joh. 500  
(below, p. 73); *Cotching v. Bassett* (1862),  
32 Beav. 101 (below, p. 74); *Civil*  
*Service Musical Instrument Association v.*  
*Whiteman* (1899), 80 L. T. 685; 68  
L. J. Ch. 484.

(*p*) See and consider *Stiles v. Couper*  
(1748), 3 Atk. 692; *Clavering's Case*, 5  
Ves. 690; 5 R. R. 146; *Hardcastle v.*  
*Shafto* (1793), 1 Anstr. 184; *Duke of*  
*Beaufort v. Patrick* (1853), ubi sup.;  
*Somerset Coal Canal Co. v. Harcourt*  
(1857), ubi sup.; *Laird v. Birkenhead*  
*Rail. Co.* (1859), Joh. 500 (below, p. 73);  
*Crook v. Corporation of Seaford* (1871),  
L. R. 6 Ch. 551. In some of these  
cases there was a pre-existing parol  
agreement.



[the grantee's rights, and thus having actual or constructive notice of the equity (g).]

Grant limited  
by the  
necessity.

The extent of the constructive grant is, by virtue of the principle on which the rule is founded, limited by the obvious and plain consequences of the act acquiesced in. "For instance, if a neighbour permit me to open a window overlooking his close, he knows the exact consequence of that permission, namely, that he is liable for ever after to be overlooked, and that he cannot afterwards so build on his close as to obscure that window; this is the extent of the injury which can be produced, and he cannot say that he did not foresee it. . . . But, if a copyholder allow the lord of the manor to work the coals under the close of the copyhold by offset out of the adjoining land, does it therefore follow that, if the lord, in winning the coal, works so near the surface as to destroy the farm buildings of the copyholder, he is to have no remedy at law for the injury so done to him? . . . Certainly not. But, in truth, all such illustrations present a weaker case than that before the Court; and the strongest illustration of the distinction to be taken in such cases appears to me to be the case of works erected, which at first seem to be and are innocuous, and which afterwards, by addition, become seriously injurious to the proprietors of the neighbouring lands" (r).

Cases not  
relating to  
easements.

Cases relating  
to easements.

Many of the cases which illustrate this principle refer to claims for a lease (s) or for a sale (t) of the fee simple estate in land, and are not strictly relevant to the subject of this treatise. But the following cases bear directly or indirectly on the acquisition of easements or of rights of a similar nature (u).

(g) See and consider *Duke of Beaufort v. Patrick* (1853), 17 Beav. 60; *Mold v. Wheatecroft* (1859), 27 Beav. 510; *Bankart v. Houghton* (1859), *ibid.* 425; *Allen v. Seckham* (1879), L. R. 11 Ch. Div. 790.

(r) Per Romilly, M. R., in *Bankart v. Houghton* (1859), 27 Beav. 425, 433. Cf. *Rochdale Canal Co. v. King* (1851), per Lord Cranworth, 2 Sim. N. S. at p. 90; 89 R. R. 211; *Tipping v. St. Helen's Smelting Co.* (1865), L. R. 1 Ch. 66; and *Bankart v. Tennant* (1870), L. R. 10 Eq. 141 (below, p. 76).

(s) *Edlin v. Battaly* (1687), 2 Lev. 152; *Huning v. Ferrers* (1711), Gilb. Eq. Rep. 85; *Hardcastle v. Shafto* (1793), 1 Anstr. 184; *Stiles v. Couper* (1748), 3 Atk. 692; *Dann v. Spurrier* (1802), 7 Ves. 231; 6 R. R. 119; *Pilling v. Armitage*

(1806), 12 Ves. 78; 8 R. R. 295; *Durham and Sunderland Rail. v. Wauw* (1840), 3 Beav. 119; 52 R. R. 56; *Master of Clare Hall v. Harding* (1848), 6 Hare, 273; 77 R. R. 115; *Kamaden v. Dyson* (1866), L. R. 1 H. L. 129; *Crook v. Corporation of Seaford* (1871), L. R. 6 Ch. 551; *Willmott v. Barber* (1880), L. R. 15 Ch. D. 96. See also, as to questions between landlord and tenant, *Jackson v. Cator* (1800), 5 Ves. 688; 5 R. R. 144, and *Brydges v. Kilburne* (1792) there cited; 5 R. R. 146.

(t) *Powell v. Thomas* (1848), 6 Hare, 300; 77 R. R. 116; *Duke of Beaufort v. Patrick* (1853), 17 Beav. 60; *Somerset Coal Canal Co. v. Harcourt* (1837), 24 Beav. 571; 2 De G. & J. 596; *Mold v. Wheatecroft* (1859), 27 Beav. 510.

(u) See also *Duke of Devonshire v.*

[In the *Watercourse Case* (x), A. diverted a watercourse, which put B. to great expense in laying of soughs, &c., and the diversion being a nuisance to B., he brought an action; but an injunction was decreed (y), it being proved that B. did see the work when it was carrying on, and connived at it, without showing the least disagreement, but rather the contrary. A case of *Short v. Taylor*, before Lord Somers, was cited, where Taylor, in building his house, laid his foundations on Short's land, he standing by and encouraging him, and an injunction was granted against his proceeding with an action for the trespass.] *Watercourse Case.*

In *East India Co. v. Vincent* (z), it would appear that the agent of the company and the defendant, a packer, agreed that the company should be at liberty to build on the defendant's ground, or with windows overlooking his ground, and that they should employ him during the term of his estate double to any other packer, provided he worked at the same rate as any other packer. As they did not employ him as agreed, he built a wall to block up their light, and Lord Hardwicke held that he ought to have brought his bill to establish the agreement, and decreed that the wall should be pulled down and that the company should perform the agreement to employ. "There are several instances where a man has suffered another to go on with building upon his ground, and not set up a right till afterwards, when he was all the time conscious of his right, and the person building had no notice of the other's right, in which the Court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance. But these cases have never been extended so far as where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement; then, if persons will build notwithstanding, they must take the consequence, as this is not such an acquiescence on the part of the owner as will prevent him from insisting on his right." *East India Co. v. Vincent.*

*Clavering's Case* was cited by Lord Loughborough in *Jackson v. Cator* (a). He says: "There was a case (I do not know whether it came to a decree) against Mr. George Clavering, in which some person was carrying on a project of a colliery, and had sunk a shaft" *Clavering's Case.*

*Eglin* (1851), 14 Beav. 530; 92 R. R. 201.

(x) (1709), 2 Eq. Cas. Abr. 522, pl. 3.  
(y) i.e., against the continuance of the action at law by B.

(z) (1740), 2 Atk. 83.

(a) (1800), 5 Ves. 690; 5 R. R. 144; cited by James, V.-C., in *Bankart v. Tennant*, below, p. 76.

*Clavering's  
Case.*

[at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground; and, when the work was begun, he said he would not give the road. The end of it was that he was made sensible—I do not know whether by a decree or not—that he was to give the road at a fair value.”

*Williams v.  
Earl of Jersey.*

*Williams v. Earl of Jersey* (b) was a suit to restrain the defendant from suing at law for a nuisance caused by copper works erected by the plaintiff at a great expense; and it was alleged that, during the progress of the works, the defendant was well aware that they were being erected and were for the smelting of copper; that, nevertheless, he allowed the plaintiff to proceed and expend large sums of money thereon, and in completing and finishing the same with the requisite machinery and plant, without making any objection, and that he acquiesced in and encouraged the erection and expenditure. A demurrer to the bill was overruled.

*Rochdale  
Canal Co.  
v. King.*

In *Rochdale Canal Co. v. King* (c), there was a motion to restrain the defendants, millowners, from drawing water from the canal for any purpose other than for condensing steam (which was allowed by the Canal Act). The defendants, by their answer, stated that, when their mill was erected, notice was given to the company of the intention to make a communication with the canal, not only for the purpose of condensing steam, but for other purposes; that the company superintended the laying of the pipes, and were aware of the uses to which they were to be applied, and made no objection, though they were cognizant of the great expense incurred. Lord Cranworth, V.-C., said: “If this be true, the plaintiffs can have no relief in this Court. Such conduct, even if it be not sufficient to sustain a plea of leave and licence in bar to an action, certainly incapacitated the plaintiffs from obtaining any assistance in a court of equity. It is not necessary to go further, and say whether it would not entitle the defendants to restrain them from proceeding at law, according to what is stated by Lord Eldon in *Barrett v. Blagrove* (d). I entirely assent to the argument, very ably urged by Mr. Bailly, that mere acquiescence (if by acquiescence is meant the abstaining from legal proceedings) is unimportant. Where one party invades the right of another, that other does not in

(b) (1841), 1 Cr. & Ph. 91; 54 R. R. 219.

(c) (1851), 2 Sim. N. S. 78; 89 R. R. 211.

(d) (1801), 6 Ves. 105.

[general deprive himself of the right of seeking redress merely because he remains passive, unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations. If, therefore, from 1830 to 1847, when the disputes began, the plaintiffs might have asserted the legal right on which they now insist, their not having done so during that period would not preclude them. But the evidence of long-continued use of the water for all purposes by the adjacent mill-owners may be very important as tending to satisfy this Court that, when the mill of the defendants was erected, the plaintiffs must have known that King, who was building it, was laying out his money in the expectation that he would have the same privilege of using the water as was enjoyed by all his neighbours.”

*Rochdale  
Canal Co. v.  
King.*

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Subsequently, Sir John Romilly, M. R., refused a perpetual injunction on the same grounds, notwithstanding some fresh evidence directed to the point that the company had made objection before the erection of the mill (e).

In *Laird v. Birkenhead Rail. Co.* (f) the plaintiff, under a treaty with the defendants for a communication between his ship-building yard and their station, constructed a tunnel and laid down rails at an expense of £1,200, and was allowed by the company to use it for two and a half years, during which time they received from him tolls for the use of the way. Because they did not finally agree as to the terms, the company gave him three months' notice to quit, and were about to take up the rails; but they were restrained by the Vice-Chancellor, who held that, notwithstanding their being a corporation, they were as much bound by their acquiescence as an individual, and were bound to allow the plaintiff the use of the way on reasonable terms, i.e., on the terms which had existed during the two and a half years, and for a reasonable time, which he considered to be for as long as the plaintiff continued owner of the yard.

*Laird v.  
Birkenhead  
Rail. Co.*

In *Bankart v. Houghton* (g) the plaintiff sought to restrain the defendant from enforcing a judgment at law in an action for a nuisance caused by copper works, on the ground that when he took his farm he was aware of the works, and his lessor had seen them while in course of erection, and took no steps to prevent their erection. The Master of the Rolls held that this was not an acquiescence

*Bankart v.  
Houghton.*

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(e) 16 Beav. 630.

(f) (1859), Joh. 500.

(g) (1859), 27 Beav. 425.

*Bankart v.  
Houghton.*

[which conferred on the plaintiff the right to cause noxious effluvia and vapour to issue from his furnaces and be deposited on the defendant's lands. He also said: "It is impossible to hold that, because a man has acquiesced in certain works which produce little or no injury, he is ever afterwards to be debarred of remedy if, by the increase of the works, he sustains a serious injury."]

*Cotching v.  
Bassett.*

In *Cotching v. Bassett* (h) the plaintiffs were lessees of No. 32, Wood Street, and the defendants owners of No. 33, which, until Michaelmas, 1861, was let to the plaintiffs. The plaintiffs, being about to rebuild No. 32, agreed with the defendants that they should continue tenants of No. 33 to Lady Day, 1862, and rebuild the party-wall. In rebuilding, they altered the windows and made additional windows, and submitted their plans to the defendants' surveyor, and the works were executed under the superintendence of the defendants' surveyor, who made no objection to the plans or as to the mode in which the works were being carried out. After the plaintiffs had completed their building, the defendants gave them notice of their intention to raise the party-wall in a manner greatly to interfere with the plaintiffs' lights. The Master of the Rolls restrained them, and held that the case came within the principle of *Dann v. Spurrier*, saying, "If the defendant intended to obtain an advantage not then possessed by him, and to derive it by reason of the acts which the plaintiffs might be induced to perform, it was incumbent on him to explain this to the plaintiffs in such a manner that it could not be misunderstood."

*Blanchard v.  
Bridges.*

*Blanchard v. Bridges* (i) was a case at law. There it appeared that the predecessor in title of the plaintiff had erected a cottage on his land, having windows which derived light from the adjoining property of his vendor, and had afterwards thrown the windows forward and converted them into bow windows. The owner of the adjoining property was often on the spot during the progress of the works, and had a general knowledge of their nature, and made no objection; but it appeared that the adjoining land had been from time to time advertised for sale in lots for building, and that the owner had on two occasions, in treating with the plaintiff's predecessor in title, specifically reserved the right to build up to the boundary of the plaintiff's property. The defendant, having subsequently purchased the adjoining property, erected a wall which interfered with the light coming to the bow

(h) (1862), 32 Beav. 101.

(i) (1835), 4 A. & E. 176; 53 R. R. 208.

[windows; and this action was therefore brought to establish the right to the light. *Blanchard v. Bridges.*

The Court of King's Bench, on a case stated, and having authority to draw any conclusion which a jury ought to have drawn, refused to presume a grant of the light on the ground of acquiescence; and Patteson, J., who delivered the judgment of the Court, said: "The fullest knowledge, with entire but mere acquiescence, cannot bind a party who has no means of resistance. There may appear to be some hardship in holding that the owner of a close who has stood by, without notice or remonstrance, while his neighbour has incurred great expense in building upon his adjoining land, should be at liberty by subsequent erections to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection: and this with good reason. For it is far more just and convenient that the party who seeks to add to the enjoyment of his own land by anything in the nature of an easement upon his neighbour's land should first secure the right to it by some unambiguous and well understood grant of it from the owner of the land, who thereby knows the nature and extent of his grant, and has a power to withhold it or to grant it on such terms as he may think fit to impose, than that such right should be acquired gradually, as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided, as we daily see, by litigation."

These words are quoted here at length because of their bearing on the principle of the equitable decisions on the doctrine of constructive grant. But it should be noted that they express the opinion, not of a court of equity, but of a court of law; and it is conceived that they are opposed to the principle adopted by the equitable courts, where entire but mere acquiescence, coupled with knowledge on the one side and misconception on the other, is sufficient to bind the party acquiescing (*k*). He has no means of resistance; but he may by notice remove the misconception. With respect to the actual decision, there were facts in the case which to some extent negatived the plea of misconception on the part of the building owner; and it is remarkable also that the acquiescence

*Remarks on  
Blanchard v.  
Bridges.*

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(*k*) See the cases quoted above, p. 67, note (*b*).

[was the acquiescence not of the defendant but of a prior owner, and there was no evidence of express notice (*l*).

*Davies v.  
Sear.*

The case of *Davies v. Sear* (*m*), which is quoted below (*n*) as illustrating the implied grant of ways of necessity, has also a bearing on the doctrine of constructive grant by acquiescence. The evidence in this case, so far as it bore upon the latter point, was to the effect that the defendant, who owned the soil of a passage leading to certain mews belonging to the plaintiff, allowed the plaintiff to block up by building all other access to the mews, and then obstructed the passage. Lord Romilly, M. R., granted an injunction, partly on the authority of *Dann v. Spurrier* (*o*) and the other cases of acquiescence. "A man cannot," he said, "stand quiet, and see it (the adjoining ground) gradually become covered with houses, so that every access or means of communication with the mews is shut out except this one, which he had always known was intended to be used as a means of access, and then say this easement was not reserved."

*Bankart v.  
Tennant.*

In *Bankart v. Tennant* (*p*), the plaintiffs had erected furnaces and smelting works upon the banks of a canal belonging to the predecessor in title of the defendant, and had for some time (while they were customers of the canal-owners) been permitted to extract water from the canal for the use of their works. They now claimed a right to the water under the authority of *Clavering's Case*; but the claim was negatived by James, V.-C., on the ground that the water was not essential, nor anything like essential, to the enjoyment of the plaintiffs' property. He added that it was impossible to suppose that the canal-owners could have intended to part with their absolute control over the canal, or with their power of letting the water off or keeping the canal idle; and therefore he did not think the plaintiffs could have acted upon the notion that they were to get a binding agreement with respect to the enjoyment of the water.]

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(*l*) See above, p. 69. and especially *Allen v. Seckham* (1879), L. R. 11 Ch. Div. 790.

(*m*) (1869), L. R. 7 Eq. 427.

(*n*) Page 177.

(*o*) (1802), 7 Ves. 231; 6 R. R. 119.

(*p*) (1870), L. R. 10 Eq. 141.

SECT. 3.—*Construction of the Instrument.*

Easements may be granted separately and apart from any conveyance of the dominant tenement, or they may be included in a conveyance of it. Mode of granting.

But few cases are to be found in the books of a grant of an easement per se; it is obvious, however, that, in all instances of this kind, the precise words of the instrument itself must determine the extent of the right created (*q*).

A man may have a way [or other easement] by grant [at the common law]; as if A. grants that B. shall have a way through his close (*r*) [or grants such a way to B., his heirs and assigns (*s*)]. Grant at common law.

An easement could not, before 1882, be created by a grant under the Statute of Uses; "for a man cannot walk over ground to the use of a third person," and "there cannot be the use of a thing not in esse, as a way, common, &c., newly created" (*t*). It followed from this that an easement could not be created under a power, or by bargain and sale, or by way of reservation; and further that, as a reservation of an easement to the grantor, contained in a conveyance of land, could only operate as a re-grant, such a conveyance must be executed by the grantee of the land (*u*). Grant under the Statute of Uses.

But now the Conveyancing and Law of Property Act, 1881, provides as follows:— Conveyancing Act, 1881, s. 62.

"(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

(*q*) See [*Senhouse v. Christian* (1787), 1 T. R. 560; 1 R. R. 300; *Mitcalfe v. Westaway* (1864), 34 L. J. C. P. 113; *Ardley v. St. Pancras* (1870), 39 L. J. Ch. 871; *Taylor v. Corporation of St. Helen's* (1877), L. R. 6 Ch. Div. 264; and] below, Part IV. Chap. III., "Extent and mode of enjoyment."

(*r*) Com. Dig. Chimin. D. (3).

(*s*) *Senhouse v. Christian* (1787), 1 T. R. 560; 1 R. R. 300; cf. *Gerrard v. Cooke*, 2 N. R. 102, 2nd ed. 109; *Holmes v. Soller* (1697), 3 Lev. 305; as to the

devolution of a right so granted, see *Dynevor v. Tennant* (1888), L. R. 13 A. C. 279; cf. *Rymer v. McLroy*, [1897] 1 Ch. 528.

(*t*) Bac. Abr. Uses, F., citing *Brantely v. Brook* (1603), Cro. Jac. 189. Cf. Com. Dig. Chimin. D. (3), ad fin. The section appears to relate only to "estates."

(*u*) *Durham and Sunderland Rail. Co. v. Walker* (1842), 2 Q. B. 940, at p. 967; 57 R. R. 842. But see *May v. Belleville*, [1905] 2 Ch. 605.



Conveyancing  
Act, 1881,  
s. 62.

[“(2.) This section applies only to conveyances made after the commencement of this Act” (x).]

It is conceived that this section is intended to alter the mode of conveyance only, and does not authorize the creation of easements of a novel kind, such as easements in gross or not connected with the enjoyment of a tenement. By virtue of this section, an easement may now be reserved, or may be granted under a power.

Construction  
of grant.

It is not within the scope of this work to discuss the rules applicable to the construction and interpretation of deeds and other written instruments (y). It may, however, be shortly stated that, in construing the grant or other instrument whereby the easement is created, the document itself, and that only, can, in the first instance, be looked at to discover the extent and nature of the easement and the other terms of the grant. If on the face of the document no doubt arises that the words are used in their primary sense, and if, read in that sense, they are plain and unambiguous, the matter is concluded. No further evidence of any kind can be admitted to show that the document does not, or was not intended to, create the easement in the exact terms of the primary meaning which the words bear. But if, on the face of the document, it appears that the words may be used in some sense other than that which they would naturally bear, or if there is some ambiguity or omission apparent on the document itself, then the circumstances existing at the time when the instrument was executed may properly receive attention. Under no circumstances can evidence of the *intention* of the parties when executing the instrument be gone into.

“Where, indeed, words have a clear, definite meaning, no evidence can be admitted to explain or control them” (a).

“But if on the face of a document, when applied by extrinsic evidence, it appears that words are used, or may be used, in a more extensive or a different signification than their primary, it becomes a question what more or other is included than would be included in the words in their primary signification” (b).

“Parol evidence is generally admissible to apply the words used in a deed, and to identify the property comprised within it. You

(x) 44 & 45 Vict. c. 41, s. 62.

(y) See, upon this subject, Norton on Deeds.

(a) *Waterpark v. Fennell* (1859), 7

H. L. C. 650, per Lord Cranworth, at p. 680.

(b) *Ibid.*, per Bramwell, B., p. 661.

[cannot, indeed, show that the words were *intended* to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include or exclude a portion of land, where the words are capable of either construction" (c). Construction  
of grant.

"The construction of a deed is always for the Court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the Court in the situation of the grantor. In deeds, as well as wills, the state of the subject at the time of execution may always be enquired into; and as with respect to ancient deeds the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage and enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, and so to prove contemporaneous usage and enjoyment at the date of the deed. These deeds are to be construed by evidence of the manner in which the subject has been possessed or used; for, as Lord Coke observes, '*optimus interpres rerum usus.*' (2 Ins. 282; *Weld v. Hornby*, 7 East, 199; *Duke of Beaufort v. Sicansea*, 3 Exch. 413.) Lord Hardwicke, with reference to the construction of ancient grants and deeds, says, 'There is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by.' That was in the case of *Att.-Gen. v. Parker* (1 Ves. 43; 3 Atk. 576). Lord St. Leonards follows in *Att.-Gen. v. Drummond* (1 Dru. & War. 368), and says one of the most settled rules of law is that you may resort to contemporaneous usage for the meaning of a deed. 'Tell me what you have done under such a deed, and I will tell you what the deed means.'

"When the evidence of all material facts is exhausted, and there is still ambiguity, no parol evidence of the grantor's intention, as distinguished from extrinsic facts, can be admissible, except in the single case of there being two subjects, or two objects, to which the terms of the instrument are equally applicable" (d).

Questions of construction of documents dealing with easements have arisen chiefly upon the grant or reservation of ways and minerals, and the cases in which particular documents creating or

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(c) *Ibid.*, per Lord Chelmsford, p. 678. v. *Marine Board of Table Cape*, [1906  
 (d) *Ibid.*, per Lord Wensleydale, A. C. 92.  
 p. 684. And see *Van Diemen's Land Co.*

[reserving such easements have been construed by the Court are dealt with in the chapters on Rights of Way and Rights to Support.]

Form of  
grant.

A covenant, or other instrument under seal, clearly evincing the intention of the parties, may operate as a grant (*e*); and upon a grant or covenant conferring an easement, the successive owners of the dominant estate, who, in the case of an ordinary covenant, would, at common law, be strangers to the contract, become entitled to the benefit of the rights conferred, and may sue for a violation of them.

Covenants  
running with  
the land.

Easements, in general, bear a strong resemblance to covenants running with the land, both express and implied; [and the better opinion being that the burden of covenants does not run with the land at law so as to bind an assignee, except in cases between landlord and tenant (*f*), it becomes important to determine in each case whether the terms of the covenant are such as to create a grant of an easement, in which case the effect of them is to create an incorporeal hereditament, giving the successive owners of it a right as against all the succeeding owners of the land affected by it, without regard to any question as to the burden of covenants running with land.

*Rowbotham v.*  
*Wilson.*

In *Rowbotham v. Wilson* (*g*), where the plaintiff sued the defendant for damage done to land and houses, by the defendant so working the subjacent minerals as to let down the surface, much discussion took place as to the effect of a covenant by the owner of land that the owner of certain minerals under it shall have a right to work the minerals, without liability for letting down the surface, the defendant relying, amongst other points, upon the effect of such a covenant; and Lord Wensleydale pointed out that such a covenant would operate as a grant, and that the grantee in that way would obtain the right to work the minerals in the manner

(*e*) *Holms v. Sellar* (1697), 3 Lev. 306. [See the judgment of Lord Wensleydale in *Rowbotham v. Wilson* (1860), 8 H. L. C. p. 362; *Oakley v. Adamson* (1832), 8 Bing. 356; *Northam v. Hurley* (1853), 1 E. & B. 665; *Low v. Innes* (1864), 10 Jur. N. S. 1037; *Miles v. Tobin* (1867), 16 W. R. 465; Conv. Act, 1881, s. 49.

In his opinion given to the House of Lords in *Dalton v. Angus*, Fry, J., said that a negative right does not lie in grant, but would be created by covenant (L. R. 6 App. Cas. at pp. 771, 773); and the opinion of Littledale, J., in

*Moore v. Rawson* (1824), 3 B. & C. 340; 27 R. R. 375, supports this view. But see per Lords Selborne and Blackburn, L. R. 6 App. Cas. at pp. 794, 823.]

(*f*) See notes to *Spencer's Case*, Smith's L. C. vol. i. p. 55, 11th ed.; and *Austerberry v. Corporation of Oldham* (1885), L. R. 29 Ch. Div. 750; *White v. Southend Hotel Co.*, [1897] 1 Ch. 767. *Morland v. Cook* (1868), L. R. 6 Eq. 252, which might appear to make against the proposition, is now treated as a case of grant. As to the rule in equity, see below, p. 81.

(*g*) (1860), 8 H. L. C. 348, 362.

[claimed. His Lordship said: "This was no doubt the proper subject of a grant, as it affected the land of the grantor; it was a grant of a right to disturb the soil from below and alter the position of the surface, and is analogous to the grant of right to damage the surface by making a way over it. No particular words are necessary for such a grant; any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose. If the words used could only be read as amounting to a covenant, it must be admitted that such a covenant would not affect the lands in the hands of the assignee of the covenantors, but if they amount to a grant the grant would be unquestionably good and bind the subsequent owners."

*Rowbotham v.  
Wilson.*

Some of the learned Judges in the Court of Exchequer Chamber, when the same case was before that Court, appear to have been of opinion that a covenant by the owner of land, that the owner of the minerals under it, or of a right to get minerals, might work without liability for damage to the surface, could only operate as a mere covenant not to sue, and therefore would not bind an assignee of the land; not recognizing the analogy pointed out by Lord Wensleydale between such a right and the right to damage the surface by making a way over it.

It is hardly necessary to point out that the principle involved in the judgment of Lord Wensleydale would be equally applicable to a grant of the right to let down the surface by working underneath made "per se" to a person already the owner either of the whole adjacent soil, or of the right to work certain minerals in that soil, as to the case where the two rights are conferred by the same instrument, as in *Rowbotham v. Wilson*.

In all such cases the questions would appear (without regarding the particular *form* of words used) to be:—1. Does an intention appear to confer a right to affect the land of the grantor or covenantor? 2. Is this right one of those as to which, either from decided cases or by analogy, it can be said that it is a right capable of being made the subject of a grant as an easement? If these two questions be answered in the affirmative, an easement has been created, and the grantee and his assignees have the right, as against the grantor or his assignees, without reference to any question as to the burden of covenants running with the land so as to bind an assignee.

In equity, the rule is different; and any covenant entered into by the owner of land with an adjoining owner, that he and his

Burden of  
covenants in  
equity.

Burden of  
covenants in  
equity.

[assigns will abstain from using his land in any particular way, binds the land in equity without regard to the question whether such covenant runs with the land or not; and such a covenant can be enforced against any subsequent owner of the land, unless the latter is in a position to set up the defence of *bonâ fide* purchase for value without notice, and has the legal estate. The benefit of such a restrictive covenant is analogous to an equitable interest in the land affected by the covenant, and, like such an equitable interest, is liable to be defeated, by the legal estate being obtained by a third party without notice of the equity (*h*).

But the principle does not extend to affirmative covenants, or covenants to do acts or spend moneys upon the land (*i*).

Benefit of  
covenant.

Covenants of this kind, whether affirmative or negative, cannot be enforced by a subsequent purchaser from the covenantee, unless either the benefit of them is such as to run with the land of the covenantee, or the covenantee has manifested an intention of obtaining, for the benefit of particular property owned by him, or of transferring to the purchaser, or of obtaining for his benefit, the covenants in question (*k*). Such an intention is a question of evidence; and where the whole property has been laid out as a building estate under a general scheme, the common vendor may

(*h*) *In re Nisbet and Potts' Contract*, [1905] 1 Ch. 391; *affd.*, [1906] 1 Ch. 386. And see *Tulk v. Moxhay* (1848), 2 Phill. 774; 78 R. R. 289; *Jay v. Richardson* (1862), 30 Beav. 563; *Clegg v. Hands* (1890), L. R. 44 Ch. Div. 583; *Mander v. Falcke*, [1891] 2 Ch. 554; *John Brothers, &c. Brewery Co. v. Holmes*, [1900] 1 Ch. 188; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Holloway v. Hill*, [1902] 2 Ch. 612; *Brigg v. Thornton*, [1904] 1 Ch. 386. As to what is constructive notice in this respect, see *Daniels v. Darison* (1809), 16 Ves. 242; 10 R. R. 171, and *Cavander v. Dulleel* (1873), L. R. 9 Ch. 79 (notice imputed for omission to inquire as to tenants' interests); *Maxfield v. Burton* (1873), L. R. 17 Eq. 15, and *Spencer v. Clarke* (1878), L. R. 9 Ch. D. 137 (omission to inquire as to interests of holders of title-deeds); *Miles v. Tobin* (1868), 16 W. R. 465; *Morland v. Cook* (1868), L. R. 6 Eq. 252; *Davies v. Sear* (1869), L. R. 7 Eq. 427, and *Allen v. Seckham* (1879), L. R. 11 Ch. Div. 790 (omission to inquire into structural peculiarities); *Carter v. Williams* (1870), L. R. 9 Eq. 678 (as

explained in *Patman v. Harland* (1881), L. R. 17 Ch. D. 353, and *Kettlewell v. Watson* (1884), L. R. 26 Ch. Div. 501 (omission to look into vendor's title); *Wilson v. Hart* (1866), L. R. 1 Ch. 463; *Patman v. Harland* (1881), L. R. 17 Ch. D. 353, and *In re Nisbet and Potts' Contract*, *ubi sup.* (omission to look into lessor's title); *Conv. Act*, 1882, s. 3; *Dart, V. & P.*, ed. 7, p. 776.

(*i*) *Haywood v. Brunswick Building Society* (1881), L. R. 8 Q. B. Div. 403; *London and South Western Railway v. Gomm* (1881), L. R. 20 Ch. Div. 562; *Andrew v. Aitken* (1882), L. R. 22 Ch. D. 218; *Austerberry v. Corporation of Oldham* (1885), L. R. 29 Ch. Div. 750; *Hall v. Ewin* (1887), L. R. 37 Ch. Div. 74. In *Catt v. Tourle* (1869), L. R. 4 Ch. 654, a covenant in terms positive was held to be in substance negative, and enforceable against the land.

(*k*) *Keates v. Lyon* (1869), L. R. 4 Ch. 218; *Renals v. Cowlishaw* (1879), L. R. 11 Ch. Div. 866; *cf. Master v. Hansard* (1876), L. R. 4 Ch. Div. 718; *King v. Dickeson* (1889), L. R. 40 Ch. D. 596.

[almost always be held to be a trustee of the covenants for the benefit of the estate as a whole and of its several parts (*l*). When such intention has been manifested, and the benefit of a restrictive covenant has been once clearly annexed to a piece of land, there is a presumption that it passes by an assignment of that land; and in such a case the covenant may be said to run with the land in equity, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption (*m*).

Benefit of  
covenant.

A restrictive covenant may cease to become enforceable by reason of a change in the character of the neighbourhood (*n*), or by continued acquiescence in a breach (*o*).]

Cesser of  
covenant.

#### SECT. 4.—*Effect of a Conveyance of the Dominant Tenement.*

##### (a.) *As to Rights legally appurtenant to the Tenement conveyed.*

Where the dominant tenement itself is conveyed, whether in fee or for any less estate, it would seem that, [even independently of recent legislation,] all rights which the conveying party enjoyed, by virtue of and as appendant to his estate, as against third parties, pass with it (*p*).

Tenements  
pass with  
their atten-  
dant ease-  
ments.

[The Conveyancing and Law of Property Act, 1881 (*q*), provides as follows:—

Conveyancing  
Act, 1881.

“(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land all buildings,

(*l*) *Western v. Macdermott* (1866), L. R. 2 Ch. 72; *Eastwood v. Lever* (1864), 33 L. J. Ch. 355; 12 W. R. 195; *Nottingham Patent Brick and Tile Co. v. Butler* (1886), L. R. 16 Q. B. Div. 778; *Collins v. Castle* (1887), L. R. 36 Ch. D. 243; *Sheppard v. Gilmore* (1887), 57 L. T. Rep. 614; *Davis v. Corporation of Leicester*, [1894] 2 Ch. 208; *Holford v. Acton Urban Council*, [1898] 2 Ch. 240; cf. *Hudson v. Cripps*, [1896] 1 Ch. 265; *Irving v. Turnbull*, [1900] 2 Q. B. 129.

(*m*) *Rogers v. Hosegood*, [1900] 2 Ch. 388; *In re Nisbet and Potts' Contract*,

ubi sup.; cf. *Formby v. Barker*, [1903] 2 Ch. 539.

(*n*) *Duke of Bedford v. Trustees of the British Museum* (1882), 2 M. & K. 552.

(*o*) *Sayers v. Collyer* (1885), L. R. 28 Ch. Div. 103; *Gaskin v. Balls* (1879), L. R. 13 Ch. Div. 324. See *Knight v. Simmonds*, [1896] 2 Ch. 294.

(*p*) 11 H. 6, 22, pl. 19; 2 Rolle, Abr. 60, pl. 1; *Beaudely v. Brook* (1608), Cro. Jac. 289; [*Skull v. Glenister* (1863), 7 L. T., N. S. 826].

(*q*) 44 & 45 Vict. c. 41, s. 6.

Conveyancing  
Act, 1881.

[erections, fixtures, commons, hedges, ditches, fences, ways (*r*), waters, watercourses (*s*), liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

“(2.) A conveyance of land having houses or other buildings thereon shall be deemed to include and shall by virtue of this Act convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights (*t*), watercourses, liberties, privileges, easements, rights, and advantages whatsoever appertaining or reputed to appertain to the land, houses, or other buildings conveyed or any of them or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land, houses, or other buildings conveyed or any of them or any part thereof.

“(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey with the manor all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishing, fisheries, fowlings, courts-leet, courts baron, and other courts, views of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciements, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

“(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained (*u*).

(*r*) *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165.

(*s*) *Burrows v. Lang*, [1901] 2 Ch. 502.

(*t*) *Birmingham, Dudley and District Bank v. Ross* (1888), 38 C. D. 295; *Broomfield v. Williams*, [1897] 1 Ch. 602;

*Dorn v. Turner*, [1900] 2 Ch. 211; *Pollard v. Gare*, [1901] 1 Ch. 834; *Godwin v. Schweppes, Ltd.*, [1902] 1 Ch. 926; *Quicke v. Chapman*, [1903] 1 Ch. 659.

(*u*) The mere description of land

[“(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing, in this section mentioned, than the title which the conveyance gives to him, to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing, in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.”] Conveyancing Act, 1881.

“(6.) This section applies only to conveyances made after the commencement of this Act.”

By virtue of sect. 2 of the same Act—

“Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses or other buildings, also an undivided share in land (x); conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance” (y).

This enactment operates to pass, with the land, advantages enjoyed with, but not strictly appurtenant to, the land; and its effect in this respect may be gathered from the following subdivision of this section.

In a case (z) where a school board having compulsory powers of purchase had given notice to treat for certain lands “with the appurtenances,” and the purchase money had been ascertained in pursuance of the notice, it was held that the vendor was entitled to have inserted in his conveyance words excluding the operation of sect. 6, except as to rights legally appurtenant to the land; and similarly, in a case where the general words of the section would have passed a right of way not in the contemplation of the contract, words defining the right of way to be granted and excluding the Act were inserted in the conveyance at the instance of the vendor (a).

A covenant for quiet enjoyment, whether express or implied, Covenant for quiet enjoyment.

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adjoining the house conveyed as “building land” does not show a contrary intention, so as to exclude the grantee’s right to light. *Broomfield v. Williams*, [1897] 1 Ch. 602; *Pollard v. Gare*, [1901] 1 Ch. 834.

(x) Sub-sect. 2.

(y) Sub-sect. 5.

(z) *In re Peck and The London School Board*, [1893] 2 Ch. 315.

(a) *In re Hughes and Ashley’s Contract*, [1900] 2 Ch. 595.



Covenant  
for quiet  
enjoyment.

[extends to an easement parcel of the demise (*b*). But it does not enlarge the grant, so as to confer an easement not within the grant (*c*); nor does a qualified covenant for title in a conveyance extend to an easement to which the grantor was not entitled (*d*).]

Divisibility of  
easements.

If a severance of the dominant tenement takes place, all its easements which are attached to the tenement and not to the person of the owner will attach to the severed portions (*e*). It is obvious, however, that by such severance no right is acquired to impose an additional burthen on the servient tenement. However numerous the occupants of the severed tenement may be, they must still confine themselves within the limits of the right existing at the time of severance.

Merlin (*f*) expresses his opinion, that wherever the object of a servitude is, from its nature, capable of a division, it may be divided. A right, for example, of drawing water from a well, to the extent of fifty buckets a day, may be divided, if the house is capable of division; and, if the house is divided into two parts, there is nothing to prevent each of the divided parts (*chacune de ces deux maisons*) from having in this water drawing (*puisage*) a right equal or unequal according to the stipulations of the instrument of partition. So if a man is bound by a servitude not to raise his wall above a certain height, there is nothing to prevent his being liberated from this burden in part, and, consequently, no reason why it should not be considered divisible.

The civil law distinctly recognized the doctrine, that the dominant tenement continues to enjoy its servitudes, notwithstanding a severance (*g*).

(*b*) *Pomfret v. Ricroft* (1669), 1 Saund. 322; *Andrews v. Paradise* (1725), 8 Mod. 319. Cf. *Child v. Stenning* (1879), 11 Ch. Div. 82.

(*c*) *Blatchford v. Mayor of Plymouth* (1837), 3 Bing. N. C. 691; *Potts v. Smith* (1868), L. R. 6 Eq. 311; *Booth v. Alcock* (1873), L. R. 8 Ch. 663; *Leach v. Schweder* (1874), L. R. 9 Ch. 463. Cf. *Spoor v. Green* (1874), L. R. 9 Exch. 99; *Anderson v. Oppenheimer* (1880), L. R. 5 Q. B. Div. 602; *Sanderson v. Mayor of Berwick-upon-Tweed* (1884), L. R. 13 Q. B. Div. 547; *Robinson v. Kilvert* (1889), L. R. 41 Ch. Div. 88. Cf. *Harrison v. Muncaster*, [1891] 2 Q. B. 680.

(*d*) *Thackeray v. Wood* (1865), 6 B. & S. 766.

(*e*) *Harris v. Drew* (1831), 2 B. & Ad.

164; 35 R. R. 527 [(as to pews); *Codling v. Johnson* (1829), 9 B. & C. 934; 33 R. R. 375; and *Newcomen v. Coulson* (1877), L. R. 5 Ch. Div. at p. 141 (as to rights of way). *Dist. Midland Rail. Co. v. Gribble*, [1895] 2 Ch. 827, where the way was erected for the purpose of affording communication between the two tenements while in the same hands. And cf. as to commons], *Tyringham's Case* (1584), 4 Rep. 36 b; *Wyat Wild's Case* (1610), 8 Rep. 78 b.

(*f*) *Répertoire de Jurisprudence*, tit. Servitude, p. 45; and see below, Part IV. Chap. III.

(*g*) Si stipulator decesserit pluribus heredibus relictis, singuli solidam viam petunt.—Dig. 8, 1, 17, de serv. [See *Ibid.* 11.]

Si prædium tuum mihi serviat, sive

(b.) *As to Rights not legally appurtenant to the Tenement conveyed.*

Questions of difficulty arise where there has been a unity of ownership of the dominant and servient tenements, and where, consequently, all easements have been merged in the general rights of property. Express grant by owner of two tenements.

Where such easements are in their nature continuous and apparent, they pass upon a severance of the tenements, by implication of law, without any words of new grant or conveyance. Indeed, properly speaking, such easements are not revived, but newly created, by an implied grant. This subject is considered in the next chapter.

The same observation applies to easements, commonly called "of necessity" (h).

Other easements, such as ordinary rights of way, will not pass upon a severance of the tenements, unless the owner "uses language to show that he intended to create the easement de novo" (i).

[This rule was acted upon in the case of *Worthington v. Gimson* (k), in which Crompton, J., cites the last three paragraphs of the text from the words "where such easements" to "de novo," and assents to the statement of the law contained in them; and in *Pearson v. Spencer* (l), Blackburn, J., in delivering the judgment of the Court, says, "We do not think that on a severance of two tenements, any right to use ways which, during the unity of ownership, has been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to show an intention to create a right de novo. We agree with what was said in *Worthington v. Gimson* (m), that in this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way."]

General words, such as "appertaining, belonging," &c., have been held in numerous instances, both with regard to rights of What words sufficient.

ego partis prædii tui dominus esse cœpero, sive tu mei, per partes servitus retinetur, licet ab initio per partes adquiri non poterat.—Dig. 8, 1, 8, de serv.

(h) Post, Chap. IV.

(i) Per Bayley, B., in *Barlow v. Rhodes* (1833), 1 C. & M. 448; 38 R. E. 653; [cf. Bro. Abr., "Extinguishment,"

pl. 15. But a right of way over a "visible road" may pass by implied grant; below, Chap. II. Sect. 1 (b)].

(k) (1860), 2 E. & E. 618; 29 L. J., Q. B. 116.

(l) (1861), 1 B. & S. 571; in error, 3 B. & S. 761.

(m) (1860), 2 E. & E. 618; 29 L. J., Q. B. 116.

What words  
sufficient.

common and way, to be insufficient to pass the right upon a severance of the tenements (*n*); but a conveyance containing the words "used, occupied, and enjoyed," has been held to be sufficient (*o*).

Indeed, these words are as much a description of the thing granted, as if the way had been set out by its termini; in either case it would be a matter to be ascertained by parol evidence, what was comprised by the description (*p*).

[Such few authorities as are inconsistent with the rule as above stated in giving to the words "appertaining" and "belonging" the same extended meaning proper to the words "used and enjoyed," must now be held to be overruled or to rest on their own special facts (*q*).

*Wardle v.*  
*Brocklehurst.*

In *Wardle v. Brocklehurst* (*r*) the Court of Exchequer Chamber acted upon the cases in which it has been held that the words "used, occupied, and enjoyed" are sufficient.

In that case, A., owner of two farms, the Lower Beach Farm, situate on a natural stream, and the Red House Farm, not so situate, conveyed the Red House Farm to the defendant, and afterwards conveyed the Lower Beach Farm to the plaintiff.

At the time of the conveyance of the Red House Farm to the defendant, there was an enjoyment and user in fact of water from

(*n*) *Saundays v. Oliff* (1597), Moore, 467; *Whalley v. Thompson* (1799), 1 Bos. & P. 371; 4 R. R. 826; *Clements v. Lambert* (1808), 1 Taunt. 205; 9 R. R. 749; *Barlow v. Rhodes* (1833), 1 C. & M. 439; 38 R. R. 653. [Cf. *Baring v. Abingdon*, [1892] 2 Ch. 374, 389, where this statement of the law was quoted and approved by the Court of Appeal.]

(*o*) *Bradshaw v. Eyre* (1597), Cro. Eliz. 570; *Wordledg v. Kingswel* (1598), *ibid.* 794; *Grymes v. Peacock* (1610), 1 Bulstrode, 17; *Kooysra v. Lucas* (1822), 5 B. & Ald. 830; 24 R. R. 575; *James v. Plant* (1836), 4 A. & E. 749; 43 R. R. 465; [*Key v. Neath Rural District Council* (1905), 93 L. T. 507; *affd.* 95 L. T. 771; the cases decided under sect. 6 of the Conveyancing Act, 1881, cited above, p. 84; and the cases cited below, p. 91, ff.]

(*p*) Phillips and Amos on Evidence, 8th ed. 732; see *Hinchcliffe v. Lord Kinnoul* (1838), 5 Bing. N. C. 28; 50 R. R. 579; *Baird v. Fortune* (1861), 7 Jur., N. S. 926. It must be remem-

bered that these words are by virtue of the 6th section of the Conveyancing and Law of Property Act, 1881, to be read into every conveyance executed since the commencement of the Act (below, p. 103).

(*q*) In Com. Dig. "Chimin," D. 3, the word "&c." may perhaps be supposed to denote "used and enjoyed," as well as appertaining. In *Hill v. Grange* (1556), 1 Plow. 170, there were expressions in the deed which excluded the proper interpretation. *Staple v. Heydon* (1704), 6 Mod. 1, and *Morris v. Edgington* (1810), 3 Taunt. 24; 12 R. R. 579, were in fact cases of ways of necessity: see per Bayley, B., in *Barlow v. Rhodes* (1833), 1 C. & M., p. 445; 38 R. R. 653; and per Denman, C. J., in *Plant v. James* (1836), 5 B. & Ad., p. 791; S. C., 4 A. & E. 749; 43 R. R. 465. *Thomas v. Owen* (1887), L. R. 20 Q. B. Div. 225, was a case of a "visible road": see per Lindley, L. J., in *Baring v. Abingdon*, [1892] 2 Ch. at p. 390.

(*r*) (1859), 1 E. & E. 1058.

[the stream, by means of an artificial culvert passing from the stream at a point above Lower Beach Farm, through some land already belonging to the defendant], and then through Red House Farm, and from that culvert at the point where it crossed Red House Farm the water was conducted by a pipe to the farm buildings of Red House Farm, while the rest flowed away through the culvert down to some dye-works belonging to the defendant.

What words  
sufficient.

*Wardle v.  
Brocklehurst.*

The conveyance of Red House Farm to the defendant contained the words "with all waters and watercourses used, occupied, or enjoyed with the premises."

The action was brought by the plaintiff, as owner of the Lower Beach Farm, for the abstraction by the defendant of water from the natural stream by means of the culvert; and it was attempted to distinguish the case from the authorities above referred to, on two grounds: first on the ground that the user and enjoyment, prior to the conveyance to the defendant, being dependent, not merely on the acquiescence of the owner of Lower Beach Farm, but upon the assent of the owner of the land through which the culvert had to pass between the natural stream and Red House Farm, "a thing so subject to capricious interruption could not at law be the subject of a conveyance." Upon this point, Williams, J., in delivering the judgment of the Court, said that if the land between the brook and the Red House Farm had belonged to a third person, the conveyance to the defendant being by the owner both of Lower Beach Farm and of the Red House Farm would amount to a statement by him that, in as far as in him lay, he granted to the defendant the Red House Farm, together with the right to divert the water from the brook, depriving himself of any right to complain thereof in respect of being the proprietor of Lower Beach Farm, and that the effect was the same as a grant by the owner of the Lower Beach Farm of the right to divert the water. To perfect that right it would be necessary to have a grant from the owner of the land between the brook and the Red House Farm; but it so happened that, in the particular case, the defendant himself was the owner of the intervening land. Therefore (s) the right, which existed only as an enjoyment before, was, by the conveyance, clothed with a legal character. The second

(s) See, as to the effect of the subsequent acquisition of title to land, by a person who had made or received a grant of an easement affecting it, the

judgment of Lord Wensleydale in *Rowbotham v. Wilson* (1860), 8 H. L. C. 364, and cf. *North British Rail. Co. v. Park Yard Co. Ltd.*, [1898] A. C. 643.

What words  
sufficient.

*Wardle v.  
Brocklehurst.*

[point of distinction relied upon was that more water was taken from the stream by the culvert than was used for the Red House Farm, and that conveyance only passed so much as was necessary to be enjoyed and used for the Red House Farm (namely, that which passed from the culvert by the pipe to the farm buildings), whereas the defendant, who happened also to be the owner of the lands into which the rest of the water in the culvert passed after it left Red House Farm, was enjoying the water for the use of works upon those other lands also. Upon this the judgment proceeds:—"It seems at first a strong thing to say that, by buying the land through which the pipe passed, *i.e.*, the Red House Farm, the defendant can get an enjoyment not only commensurate with the uses of the farm, but sufficient for his other works also. The answer, however, seems to be, that by purchasing the Red House Farm and the enjoyment of the watercourse going through it, he has acquired a right to the watercourse as it existed at the time of the conveyance to him. It is true the enjoyment was only by means of the pipe from the culvert, but he could not have enjoyed that without the existence and continuance of that culvert. The culvert was ancillary to the right. It is plain, as the right conveyed was to have the water enjoyed by the owners of the Red House Farm, and to have it in the way in which they enjoyed it, and as that way was by means of the flow through the culvert, the defendant was entitled to the continuance of that flow. The consequence is, that after it has passed Red House Farm, the defendant gets a very beneficial enjoyment of it below. But that result does not deprive him of the right to have the flow continued. If he were not entitled to such continuance, he would be obliged to put up some works to provide for the enjoyment of his right to the water. This the plaintiff is not entitled to call upon him to do" (*t*).

Effect of an  
express  
reservation.

In *Tatton v. Hammersley (u)*, the effect of the words "used and enjoyed" was held to be destroyed by an express reservation of the close over which the way was claimed, with the appurtenances; but it may be doubted whether the decision would now be upheld

(*t*) It would appear from the authorities quoted in the next chapter that, even without the special words referring to watercourses used and enjoyed with the premises, the easement claimed would have passed to the defendant as "continuous and apparent." And the

same remarks apply to *Key v. Neath Rural District Council* (1905), 93 L. T. 507; *affd.* 95 L. T. 771; and to cases of continuous and apparent easements decided under the Conveyancing Act, 1881, s. 6, as to which see below, p. 103. (*u*) (1849), 3 Exch. 279.

[on this ground. It may, perhaps, be supported by the consideration that the way was claimed by grant under the Statute of Uses (x).

It was for some time much debated whether a grant of easements "used and enjoyed" with the premises conveyed, passes only such privileges as have at some former time been used therewith as of right, or all conveniences in fact used therewith at the date of severance. In the former case it would be necessary to show in every case that the tenement granted had at some time been held separately from the tenement retained, with a legal right to the easement claimed in respect of it.

Whether previous enjoyment as of right necessary to be shown.

It is now settled law that no such necessity exists.

Now settled that previous enjoyment not necessary.

But the cases upon this point are important as illustrating the difficult question, what amount and quality of user during the unity of possession constitute such a dependence of one tenement upon the other as will, under a grant of the dependent tenement with ways, &c. used and enjoyed therewith, ripen into an easement.

In all the cases decided before *Thomson v. Waterlow* (y), with the doubtful exception of *Kooystra v. Lucas* (z), such a previous severance and enjoyment as of right appears to have existed, though in none of them was the decision put upon that ground.

Early cases on the point.

In *Kooystra v. Lucas* (z), the defendant had demised to the plaintiff two tenements, Nos. 69 and 70, Oxford Street, with a piece of ground immediately behind No. 70, which had once formed part of a yard known as Sprang's Dairy; and the lease included all ways, passages, &c. to the demised premises belonging or therewith or with any part thereof used and enjoyed. At the time of granting the lease, and for many years before, the whole of the yard (including the part now demised) had been in the possession of one person, who had used a gateway between Nos. 71 and 72 as a way for his horses and cattle to every part of the yard. The plaintiff built a coach-house and some stables upon the part demised, and claimed to use the gateway and a way over some part of the yard (a) as a means of access to them; and it was held that, by the terms of his lease, he was entitled to do so.

*Kooystra v. Lucas.*

(x) See above, p. 77.

(y) (1868), L. R. 6 Eq. 36.

(z) (1822), 6 B. & Ad. 830; 24 R. R. 575.

(a) Kelly, C. B., in commenting on this case in his judgment in *Langley v. Hammond* (1868), L. R. 3 Exch. at p. 169,

does not refer to this latter claim, which appears from the statement of facts. So far as the judgment and the reporter's head-note are concerned, the case might simply relate to the question of the divisibility of easements, discussed above at p. 86.

Whether previous enjoyment as of right necessary.

*Kooystra v. Lucas.*

[It does not appear by the report whether the part demised had been held separately from the remainder of the yard, and with a legal right of way over it; and, though it may fairly be inferred from the silence of the reporter that there was no evidence of any such severance, the case cannot be regarded as an express authority upon the point discussed in *Thomson v. Waterlow*. The report does not show how far the part demised had been used as dependent on the part retained, nor whether there was any defined or usual track between the gateway and the part demised. Neither does it appear whether there was any practicable approach to the plaintiff's stables except through the gateway.

*Thomson v. Waterlow.*

In *Thomson v. Waterlow* (b), it appears that J. and R. Fellowes, being the owners of closes A. and B., had made a road leading from a common adjacent to close A., over close A. to close B., and had used it for their personal convenience in the management of their property. Close B. had been sold to the plaintiff, who was the owner of an estate lying beyond it, and had been conveyed to him with all ways, &c. therewith occupied or enjoyed; close A. had then been sold and conveyed to the defendant. The plaintiff claimed to use the road above referred to as appurtenant to close B. Lord Romilly, M. R., decided against this claim.

"There is," he said, "it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties. I do not think that the judges in *Plant v. James* (c) intended to lay down that such words of conveyance as were used in that case, and in the present, would constitute the grant of a right of way where the user had sprung solely from the convenience of the person who held the tenements, which convenience ceased to exist when the severance between the closes took place.

"My meaning will be better explained by an example: Suppose the proprietor of a large farmyard, contiguous to and opening on a high road, to possess six fields continuously adjoining each other in a line diverging from the high road, and that for the convenience of cultivating them the owner has been in the habit

(b) (1868), L. R. 6 Eq. 36.

(c) (1836), 5 B. & Ad. 791; 4 A. & E. 749; 43 R. R. 465.

[of carting manure from the farmyard on to the most distant close, and also of conveying the produce of this field through the other fields to the farmyard, and on to the high road.

Whether previous enjoyment as of right necessary.

*Thomson v. Waterlow.*

"If, in that state of things, the proprietor should sell the most distant field to a gentleman who made it a part of his park, which was contiguous to it, and which was still more distant from the high road, does the case of *Plant v. James* mean to lay down that in such a case, if in the conveyance the vendor used the words which are contained in this deed, the purchaser of the field would thereby acquire a right of way from his park through the land of the vendor to the high road, and through his farmyard? I think nothing less than express words describing such a road would be sufficient for such a purpose. But the case would be very different if the owner of the park had always had a right of way from the park through the six closes to the high road, and had afterwards become the purchaser of those six fields and the farmyard, whereby the right of way had become merged by unity of possession, and if he had afterwards sold the park and the adjoining six fields to a purchaser, and in the conveyance conveyed to that purchaser 'all rights of way now or heretofore used, occupied, or enjoyed,' then these words would point expressly to the ways formerly used.

"In the case before me, there was no previous right of way to be merged; how then can unity of possession create in one case what it suspends in another case (d), and give to the purchaser of the outlying closes all the same modes of access over the rest of the adjoining property of the vendor which that vendor used before the sale? It is clear that it cannot, on behalf of the plaintiff, be put less high than this, for why should the purchaser be allowed to select one out of half-a-dozen ways which the vendor was habitually using?

"It is obvious, therefore, that if these words were held to create a new right of way, they would give the purchaser of the outlying field a right of going over the adjoining property of the Messrs. Fellowes in every direction in which they had been accustomed to go from or to the land in question, and that in a case where such access is not necessary for the convenient use and occupation of the

(d) It seems probable that there is some mistake here in the report. Obviously it is not the unity of possession,

but the express grant accompanying the severance, which is said to create the right of access.



Whether previous enjoyment as of right necessary.

*Thomson v. Waterlow.*

[piece of land so sold. This evidently could not be the intention of the vendor. The question depends upon the construction of the deed ; and it is clear that these words have only a natural meaning belonging to the circumstances of the case, and not a technical meaning extending to every road which the owner may have made for his own temporary convenience. I do not think the words have such a meaning by themselves. I do not think the vendors used them in that sense. I think no case exists which compels me to give them a meaning contrary to that which, in the circumstances of the case, they will properly bear.

“The case, therefore, must depend upon this circumstance, whether there was a road used before the vendors held the property; in other words, whether it was an old road which became merged by the unity of their possession, or whether it was simply a road used for their own convenience in managing the property.”

*Langley v. Hammond.*

In *Langley v. Hammond* (e) the defendant was the owner of a house and pleasure-ground, and was the lessor of a farmyard, with some outbuildings erected upon it, which adjoined his pleasure-ground on the west. The entrance to the farmyard was in a street to the north ; and, from the entrance gate straight across the open yard and terminating at the opposite hedge on the south (in which there was no gateway or means of exit), was a hard gravelled roadway, used for carting the farm produce into the yard, and for the more convenient access to the buildings thereon, and not fenced in on either side. In 1866 the defendant, wishing to regain possession of that portion of the farmyard which immediately adjoined his pleasure-ground and lay between the boundary of his grounds and the roadway above mentioned, for the purpose of making a kitchen garden, took a surrender of this strip of land and the outbuildings upon it, “together with all ways . . . therewith now used, occupied, and enjoyed,” and covenanted to make and keep in repair a boundary fence between the strip surrendered and the remainder of the farmyard. After the surrender the defendant claimed the right to have a gateway in the boundary fence, and to use the whole length of the roadway as an access to the strip surrendered. She had no other means of getting to this strip with a cart, unless she made a road through her pleasure-ground. At the trial the judge directed the verdict to be entered for the plaintiff ; and a

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(e) (1868), L. R. 3 Exch. 161.

[rule nisi, obtained by the defendant, to enter the verdict for her, was discharged by the Court of Exchequer.

Whether previous enjoyment as of right necessary.

*Langley v. Hammond.*

Kelly, C. B., in giving judgment, said: "I do not enter into the question of how far this was a defined fixed road. Though it is spoken of as a hard gravelled road, it seems to have been more properly a track; but at any rate it was a way along which persons occasionally passed from West Street to the land containing the buildings. The question is this: there never having been a time, previously to the surrender of 1866, when the two pieces of ground were owned and used by different persons, so as to make it possible for a right of way in a strict sense to exist, but the way having only been used for the accommodation and at the pleasure of the owner of both properties, was a right of way, upon the severance of the properties by the conveyance or surrender of 1866, created or passed by law by virtue of general words, which we may take as being the largest and most extensive that could have been used? I am of opinion that it was not. The law resulting from the numerous and complicated cases to which we have been referred is simply this: When the owner of a piece of land has a right of way over adjacent land, so that he may maintain at any time an action for an obstruction, if afterwards by inheritance or purchase both pieces of land come to one and the same owner, the right is necessarily at an end, the enjoyment thenceforth being the mere exercise of a right of property on his own land. But, if at a later period the properties again fall into the ownership and possession of different persons, and in the conveyance of the land to which the right of way was formerly attached, the words are found, 'together with all ways, &c. used or enjoyed therewith,' the effect of these words is to revive the right that formerly existed, and which has been, not extinguished, but only suspended. But since it does not appear here that at any antecedent time there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words cannot make or revive a right of way that never before existed.

"I need not examine the authorities at length; the effect of them may be correctly gathered from the judgment of the Master of the Rolls in *Thomson v. Waterlow*, which relieves me from the necessity of considering them in detail."

Martin, B., seems also to have considered himself bound by the judgment of the Master of the Rolls in *Thomson v. Waterlow* to decide the case on the same ground.

Whether previous enjoyment as of right necessary.  
—  
*Langley v. Hammond.*

[Bramwell, B., gave judgment as follows:—"I also think this rule must be discharged. I am not prepared to say, and I do not understand the Master of the Rolls to have decided, that a right of way could not pass under words such as those here used, even though there had always previously been unity of ownership and possession. And should the case arise, I should wish for time to consider before I consented to the doctrine supposed to have been laid down. Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house, I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is that there is here really no defined road. It is said that it is hard and gravelled, but in truth, as soon as you turn out of West Street, you do not come into what is a road and nothing else, kept for no other purpose, but into a rick-yard, where the occupier could, and no doubt did, go in any particular direction he desired. But this is not a way of such a definite kind as will pass under general words; it is no more a way (if I may use the illustration) than the short cut a man may take across his room from the piano to the fireplace is a way. In one sense, no doubt, it is a way which he may use; but he only uses it equally with ways in other directions, by virtue of his right of possession, not because there is any road made there, but because it is the shortest cut to the place he wishes to get to.

"Another ground is this, that, assuming any way to exist, it would be merely a way up to the nearest part of the adjoining land; but the defendant claims to go through the whole piece to the extreme end. As these grounds are in my judgment sufficient, I will not entangle the case by a consideration of the other questions raised."

*Watts v. Kelson.*

*Watts v. Kelson* (f), a case of watercourse, was decided on another point and without reference to the words of the grant of easements; but, in the course of the argument and of the judgment, the Lords Justices *James* and *Mellish* expressed their concurrence in the observations of Baron Bramwell in the above case of *Langley v. Hammond*.

[The point was well raised in *Kay v. Oxley* (g). The defendant had conveyed to the plaintiff a messuage, with a cottage and stable belonging to it, called "Roseville," "together with all . . . . ways and rights of way . . . . with the same or any of them now or heretofore demised, occupied, or enjoyed." A former tenant of Roseville had, by permission, built a loft over the cottage, with apertures opening on to a private farm-road passing over other land of the defendant; and he and his under-tenants had, up to the time of the sale to the plaintiff, used the defendant's farm-road to get hay and corn to the loft. It was held that the plaintiff was entitled to use the road for the same purposes.

Whether previous enjoyment as of right necessary.  
*Kay v. Oxley.*

"The first case," said Blackburn, J., "relied on for the defendant is *Thomson v. Waterlow* (h) before the late Master of the Rolls; and I cannot help thinking that he must have been misunderstood. He is reported to have said: 'There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to the other, and which has become merged by the fact of the same person having become the owner of both properties.' I quite agree that there is a distinction. The way which had existed previously to the unity of possession, and which still continued to exist, is obviously one to be used and enjoyed as appertaining to the other premises. In the case of the other way it would require to be seen whether it had been so used and enjoyed. Then the Master of the Rolls continues: 'I do not think that the judges in *James v. Plant* (i) intended to lay down that such words of conveyance as were used in that case and in the present would constitute the grant of a right of way, where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place.' Taking that as the rule to be applied as to matter of fact, I think it is a sound one. I think, whenever it appears that an alleged right of way had been used for the convenience of the person who held both tenements, which convenience ceased to exist when a severance took place, it is a good rule to adopt to say that the way was not used or enjoyed as appurtenant to the premises—it was used for the convenience of the man who was the occupier of the

(g) (1875), L. R. 10 Q. B. 360.  
(h) (1868), L. R. 6 Eq. 36.

(i) (1836), 4 A. & E. 740; 43 R. R. 465.

Whether previous enjoyment as of right necessary.

*Kay v. Oxley.*

[two; and, when he ceases to be the occupier of the two, I think it is no longer appurtenant. That, I think, is a sound rule. And, though the facts of the case before the late Master of the Rolls are not set out, I presume they were such as to show that the right of way said to pass was for the convenience of the person so long as he was the occupier of the whole premises to which and over which the way went. Looking at it in that view, it would seem to have been a sound enough decision.

“In *Langley v. Hammond* (k) the Lord Chief Baron is reported to have laid it down as a matter of law: ‘Since it does not appear here that at any antecedent time,’ that is, before the unity of possession, ‘there existed a right over one of these pieces of land attached to the other piece of land, the effect of these words,’ (together with all ways used or enjoyed therewith) ‘cannot make or revive a right of way that never before existed.’ And then he goes on to cite what I have read from the judgment of the Master of the Rolls in *Thomson v. Waterlow*. No doubt the Lord Chief Baron so lays down the law; and, if that had been the decision of the Court of Exchequer, we should have been bound by it, and we must have left the question whether it was right or no for the Court of Error. But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right. If the words, as my brother Lush suggested in the course of the argument, had been ‘together with the right of way which Green (the under-tenant of Roseville) de facto has enjoyed of passing over the private farm-road,’ supposing that had been a right of way never enjoyed as of right but merely a way de facto used, still, I think the words would have clearly enough created a right of way. I quite agree, where there is a track across the middle of a stack-yard, and the owner sold one side of the stack-yard to enable the purchaser to throw it into his pleasure-grounds, that track across the middle of the stack-yard would not, to use the words of the Master of the Rolls, be a right of way appurtenant to every portion of the stack-yard, but a right of way solely for the convenience of the person who held the whole stack-yard, which convenience ceased to exist when he severed one part of the stack-yard from the other. That is a good and sound distinction; and, taking it in that way, which is the point Martin,

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(k) (1868), L. R. 3 Exch. at p. 168.

[B., went upon, I think the decision is perfectly good and right. As to the Lord Chief Baron's dictum, I do not think that what the Master of the Rolls said amounted to so much; but, if it did, we have the dicta of the Lords Justices James and Mellish in *Watts v. Kelson* (l), showing that they do not agree in the doctrine. It cannot make any difference in law, whether the right of way was only de facto used and enjoyed, or whether it was originally created before the unity of possession and then ceased to exist as a matter of right, so that in the one case it would be a right created de novo, in the other merely revived. But it makes a great difference as matter of evidence on the question whether the way was used and enjoyed as appurtenant."

Whether previous enjoyment as of right necessary.

*Kay v. Ozley.*

The judgment of Lush, J., was to the same effect.

Other cases on the meaning of easements used and enjoyed, &c.  
*Barkshire v. Grubb.*

In *Barkshire v. Grubb* (m), the main question was raised in this way. Two brothers and two sisters, tenants in common in equal shares of a piece of ground which had never been divided, verbally agreed that the land should be partitioned as follows, viz., that one portion (coloured green on a plan afterwards prepared, and so referred to in the case as the green portion) should be conveyed to the elder brother, another portion (called the pink portion) to the second brother, and the remainder (called the blue portion) to the elder sister, the remaining sister receiving 50% from the brothers for her share of the land. On the pink and blue portions stood a double cottage, or building divided into two cottages. This building stood to the east of a high road, from which it was separated by part of the pink land. The eastern cottage (the one farthest from the high road) stood on the blue portion; the western cottage stood on the pink portion. Access from the high road to both the cottages was obtained by a clearly defined gravel path, which had been constructed during the unity of possession, and passed over that part of the pink portion which separated the cottages from the high road. The deed of partition, executed in pursuance of the agreement above set out, was so drawn as not to divide the pink portion from the blue, but to make the younger brother and the elder sister tenants in common of both; but the brother took possession of the pink portion, and the sister of the blue. The brother having stopped up the path, an action was brought by the sister for partition of the pink and blue portions, or for rectification of the deed already executed.

(l) (1870), L. R. 6 Ch. at pp. 172, 174. (m) (1881), L. R. 18 Ch. D. 616.

Easements  
used and  
enjoyed, &c.

*Barkshire v.  
Grubb.*

[The action was heard by Fry, J., who held that the plaintiff was entitled to have the deed reformed, so as to give her, instead of an undivided moiety of the pink and blue land, the blue land in severalty, together with a right of way over the gravelled path for all purposes connected with the blue land, and ordered the brother to restore the path.

Judgment of  
Fry, J.

“In determining how the conveyance ought to be framed, the Court could not exclude from its consideration the fact that the gravelled path was actually used as the mode of access from the road to the cottages. Further, I must observe that from the evidence it appears that there was in fact at this time no other path leading from the high road to the cottages; and, upon the scheme of the agreement, there was no other which could well be used for access to the blue land, for that land was on all sides surrounded either by the pink or by the property of strangers. Therefore, in my opinion, the deed to carry into effect the agreement ought to have contained a grant of a right of way to the plaintiff over the gravelled path. But I will go a little further, and will suppose that the deed executed in pursuance of the agreement, instead of expressly granting the way, had contained only the ordinary general words; would those words have passed this right of way? I think that among the general words would have been found a grant of ‘all ways now used or enjoyed with’ the blue land (n). Then the simple inquiry would have been, was the way in question, at the time of the execution of the deed, used or enjoyed with the blue land? If it was, it would have passed with the deed; if it was not, it would not have passed (o). I have already found upon the evidence that the way was used at the time with the blue land; and, therefore, in my opinion, it would have passed under those general words.” The learned Judge then reviewed the authorities, and said that the doubt, introduced by the cases of *Thomson v. Waterlow* (p) and *Langley v. Hammond* (q), whether the

(n) See, however, *Bolton v. Bolton* (1879), L. R. 11 Ch. D. 968. Cf. *Nicholls v. Nicholls* (1900), 81 L. T. 811.

(o) It is difficult to reconcile with the principles here stated the decision of V.-C. Kindersley in *Daniel v. Anderson* (31 L. J., Ch. 610; 8 Jur., N. S. 328). For, if the way there claimed was in fact used with No. 4, Mincing Lane, during the unity, and if the plaintiff was entitled to a grant of all

ways used with the property, he was entitled as against his vendor to the way in question. And, as the defendant presumably had notice of the plaintiff's rights (see *Fewster v. Turner*, 11 L. J., N. S. Ch., per Wigram, V.-C., at p. 163), the plaintiff had the same rights in equity as against him.

(p) (1863), L. R. 6 Eq. 36.

(q) (1863), L. R. 3 Exch. 161.

[above words would be sufficient to pass ways never enjoyed as of right and over a separate property, was dispelled by the dicta in *Watts v. Kelson* (r) and the decision in *Kay v. Oxley* (s). After quoting the opinion expressed by Baron Bramwell in *Langley v. Hammond* (t), he continued: "I adopt that view: I think that, where there are two adjoining closes, and there exists over one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the general words 'together with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

Easements  
used and  
enjoyed, &c.

*Barkshire v.  
Grubb.*

The point arose once more in *Bayley v. Great Western Rail. Co.* (u), and the law as laid down by Fry, J., in the above case was affirmed by the Court of Appeal. In this case, the Great Western Railway Company had purchased from the plaintiff, under the powers of their Act, a piece of land on which was a stable; and by the conveyance to the company the land was granted "together with all . . . rights, members, and appurtenances . . . deemed, taken or known, held, occupied or enjoyed as part, parcel, or member thereof." Access to the stable from the high road had always been obtained by means of a private road passing over other land of the plaintiff, and constructed during the unity of possession of such other land with the land conveyed; and this means of access had apparently been granted or permitted to a tenant of the plaintiff up to the date of the conveyance. It was held by Chitty, J., and by the Court of Appeal, that the company had, by virtue of the conveyance, the right to use this private road, although the conveyance affected to grant, not "ways" but "rights" enjoyed with the stable, and notwithstanding that the stable was purchased for the purpose of the defendants' undertaking. Chitty, J., said that, in this connection, the term "rights" must be used in some secondary sense, and as denoting something less than the legal right; and treated *Kay v. Oxley* (x) and *Barkshire v. Grubb* (y) as settled law. The Lords Justices also treated this point as decided by those cases, and chiefly considered the distinction attempted to be made

*Bayley v.  
Great Western  
Rail. Co.*

(r) (1870), L. R. 6 Ch. 166.  
(s) (1875), L. R. 10 Q. B. 360.  
(t) Above, p. 96.

(u) (1884), L. R. 26 Ch. Div. 434.  
(x) (1875), L. R. 10 Q. B. 360.  
(y) (1881), L. R. 18 Ch. D. 616.



*Bayley v.  
Great Western  
Rail. Co.*

Result of the  
cases.

Whether  
track need  
be visible.

Whether  
closes must  
be divided.

[between a railway company taking land under compulsory powers and an individual (z).

The result of the authorities is that, so far as the cases of *Thomson v. Waterlou (a)* and *Langley v. Hammond (b)* rested on the distinction between ways once enjoyed as of right and ways only enjoyed in fact, these cases may be taken to be overruled. The effect to be given to the words "used and enjoyed" is thus simply a question of construction (c), to be determined with due regard to the facts existing at the time of the conveyance (d).

In some cases, stress is apparently laid on the fact that the right is claimed over a "formed," "made," or "hard gravelled" road, *i.e.*, a road physically and visibly marked out as such. No doubt this marking out is of great importance as evidence of user; for, if the user be (as to support the grant it should be) a fixed and definite user, it is unlikely that no visible track should have remained. But the visibility is not itself an essential matter for the purpose now under discussion. The way to be proved is an incorporeal user, not a visible or bodily way, nor even an user evidenced by a "signe apparent" (e).

Neither is it essential that the close over which a way is claimed under these words, should have been, before the severance, physically divided off and distinguished by buildings from the close in respect of which the way is claimed. They may have been both part of one undivided close. But here again, such a physical division is of value as evidence of the dependence of one close upon the other, or of the user of one close as quasi-dominant over the other.

(z) Certain observations made by Chitty, J., and by Bowen and Fry, L. J.J., lead to the conclusion that they might have held the way to have passed even without an express grant of ways or other rights. This point is considered in the next chapter.

(a) L. R. 6 Eq. 36.

(b) L. R. 3 Exch. 161.

(c) See per Bowen, L. J., in *Bayley v. Great Western Railway* (1884), L. R. 26 Ch. Div. at p. 455; and per Fry, L. J., *ibid.* p. 456.

(d) *Hall v. Byron* (1877), L. R. 4 Ch. D. 667, a case of common. And see *Roe v. Siddons* (1888), L. R. 22 Q. B. Div.

224, where it was held that a grant of land, with all ways "now or heretofore" held or enjoyed as appurtenant thereto, did not create a right of way over a road formerly used in connection with the land conveyed, but shut off from it by a stone wall twenty years before the conveyance. Cf. *May v. Belleville*, [1905] 2 Ch. 605. The word "heretofore" is not contained in sect. 6 of the Conveyancing Act, 1881.

(e) These observations do not, of course, apply to the case where a way is claimed, as an "apparent" easement, under a grant not referring to use and occupation. This case is considered in the next chapter.

[It should be noted that a grant of ways, &c., "occupied or enjoyed" with the premises conveyed, is *prima facie* implied in every conveyance dated after the year 1881 (*f*). But the implication is subject to the terms of the conveyance and the circumstances under which it was executed; and the fact that the conveyance expressly includes lights "appurtenant" to the property is an argument against its passing other privileges not so appurtenant.

In *Beddington v. Atlee* (*g*), the owner of a house and a plot of land adjoining, first granted a lease of the house, then contracted to sell the land to the defendant, and afterwards contracted to sell the house, subject to the lease, to a person through whom the plaintiff claimed. These two contracts for sale were in fact carried into effect by conveyances in the order following, namely, the conveyance to the plaintiff was executed first and the conveyance to the defendant afterwards. The plaintiff subsequently determined the lease upon a breach of condition, and recovered possession of the house.

Upon the defendant commencing to build on the adjoining land so as to obstruct the lights of the plaintiff's house, the plaintiff instituted proceedings, claiming an easement of light over the adjoining land, on the grounds (*inter alia*) of an express grant, by virtue of the Conveyancing Act, 1881, s. 6. The conveyance of the house to the plaintiff contained the words "together with the ways, paths, passages, lights, rights, easements and appurtenances."

Chitty, J., in dealing with the question of the Conveyancing Act, said (*h*): "Then the plaintiff says that, inasmuch as these lights were—and he is quite right in point of fact—actually enjoyed at the time of the conveyance, therefore there is an express grant to him of the lights. No doubt these words do carry the plaintiff's case beyond what the law otherwise would have done (*i*), and far beyond what the deed itself does. Conveyancers had, previously to the passing of this Act, invented a form which carried not the appurtenances merely, such as are strictly so in law, but carried rights which were usually enjoyed at the time of the conveyance, the effect of which was, in many cases, to grant *de novo* a

(*f*) Conveyancing Act, 1881, s. 6, above, p. 83.  
(*g*) (1887), 35 C. D. 317.

(*h*) At p. 331.

(*i*) But see *Godwin v. Schweppes, Ltd.*, cited below, p. 107.

*Beddington*  
v. *Atlee*.

[right. I am bound, then, to read into the conveyance the words of sect. 6, sub-sect. 2, unless the 4th sub-section applies. The 4th sub-section runs thus: 'This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance, and to the provisions therein contained.' The question is, whether the deed, which mentions the appurtenances thereto belonging in such a form as to show that only appurtenances strictly so called would pass, is a sufficient expression of a contrary intention . . . . There is not an expression of a contrary intention in so many words. What there is in the deed is an expression that something shall pass, and something less than would pass under the Act, and the question is, whether the maxim *expressio unius est exclusio alterius* is strong enough to apply to such a case as is before me." The learned judge did not answer this question, deciding against the claim of the plaintiff, on the ground that, by reason of the prior contract for sale to the defendant of the adjoining land, the common vendor was not in a position, at the date of the plaintiff's conveyance, to grant, either by express or implied grant, the right to light claimed by the plaintiff.

*Birmingham,*  
*Dudley, and*  
*District Bank-*  
*ing Co. v.*  
*Ross.*

In *Birmingham, Dudley and District Banking Co. v. Ross* (k), the Corporation of Birmingham granted a lease to the predecessor in title of the plaintiffs of a piece of land, and a building then recently erected thereon by the lessee under a building agreement, "with the rights, members and appurtenants to the said premises belonging." The building abutted on a passage twenty feet wide, which the Corporation agreed to keep open, and on the other side of the passage were old buildings about twenty-five feet high. It was held that the plaintiffs had no right against the Corporation, or against persons claiming under them, either under the general words in the lease or the grant implied by the Conveyancing Act, to prevent the erection, on the site of the old buildings, of buildings eighty feet high which materially interfered with the light to the house leased to the plaintiff, and Cotton, L. J., after referring to sect. 6, sub-sect. 2 of the Act said (l): "But in my opinion, even with the assistance afforded us by the language of this deed, this could not be said to be a light, within the meaning of this section, enjoyed with the house. The house had only recently been erected, and at the time when this lease was granted it was obvious to both parties that this was a large tract of land bought

(k) (1888), 38 C. D. 295.

(l) At p. 307.

[by the Corporation of Birmingham for the purpose of effecting an improvement, and for the purpose of the land being laid out so as to have buildings upon it, and at the time when the lease was granted, Corporation Street had only just been formed; and there was no plan of the buildings upon it, but it was the duty of the Corporation, as of course it would be their interest, to lay this out in such a way as to make it available for recouping the expenses, and also to be an improvement to this portion of Birmingham. Therefore, I think it could not be said that the light coming over that low building to these windows could be considered as enjoyed with it within the meaning of this section. The light did in fact at that time come over that building; but it came over it under such circumstances as to show that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period, and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section. That expression must mean, not light which a person has a right to under the statute, but that which he has enjoyed under circumstances which would lead to an expectation that the enjoyment of that light would be continued, and that it would not be simply precarious.”

*Birmingham,  
Dudley, and  
District Bank-  
ing Co. v.  
Ross.*

Query also whether, in that case, the express agreement to keep open the passage might not be construed as negating any further right to light, and therefore showing a “contrary intention” within the meaning of sub-sect. 4 of the section.

In *Broomfield v. Williams* (n) it was held that a description of land retained by a vendor as “building land” was insufficient to show a “contrary intention” within sub-sect. 4 of sect. 6 of the Act, and that the purchaser was, under sub-sect. 2 of the section, *prima facie* entitled to all lights enjoyed with a recently-erected house sold to him, as those lights were enjoyed at the date of the conveyance, and that the burden of setting limits to the right lay on the vendor.

*Broomfield v.  
Williams.*

In *Born v. Turner* (n) the section was referred to and treated as passing a right to light over land retained by the vendor, on a sale by him of the property in respect of which the right was claimed.

*Born v.  
Turner.*

In *Titchmarsh v. Royston Water Co., Ltd.* (o), a claim was put forward under the general words contained in the section to a right

*Titchmarsh v.  
Royston Water  
Co., Ltd.*

(m) [1897] 1 Ch. 602.  
(n) [1900] 2 Ch. 211.

(o) (1900), 81 L. T. 673; 48 W. R. 201.

*Titchmarsh v.  
Royston Water  
Co., Ltd.*

[of way over a road running alongside of, but not having any means of communication with, property purchased from the plaintiff's lessor by the defendants. The case was decided adversely to the claim, so far as the point now under consideration is concerned, upon the ground that the road never was enjoyed with, or reputed to belong to, the defendants' property.

*Brazier v.  
Glasspool.*

In *Brazier v. Glasspool* (*p*) the defendant, in April, 1898, agreed with the plaintiff for the sale to him of a piece of land for the purpose of getting gravel with the right to use a tramway then about to be constructed for the purpose of hauling the plaintiff's gravel to a railway. In August, 1898, the defendant granted a lease of his property, including the site of the tramway, to a limited company, who agreed with the plaintiff for the haulage of his gravel over the tramway. In December, 1898, the defendant conveyed to the plaintiff the piece of land agreed to be sold to him in April, "with the appurtenances." It appears that at this date the tramway had been constructed and was being actually used, and on the plan to the plaintiff's conveyance it was shown and marked as a tramway. In August, 1900, the defendant acquired back the leasehold interest of the company, and subsequently disputed the plaintiff's right to use the tramway. It was held, upon these facts, that by virtue of sect. 6 (1) of the Conveyancing Act, 1881, there was an express grant of the use of the tramway, as being a "right" within the terms of that sub-section; and the learned judge expressed his opinion that this right might have been exercised against the limited company, who took their lease with notice of the agreement between the plaintiff and the defendant.

*Pollard v.  
Gare.*

In *Pollard v. Gare* (*q*), a landowner contracted to grant a lease of a vacant piece of land when a house of a specified character was built thereon, and, after the erection of the house, granted the lease, retaining adjoining land; and it was held by Kekewich, J., that the lessee was entitled to an injunction restraining the owner of the adjoining land, who claimed under the lessor, from obstructing the access of light to the house. The learned judge dealt with the case, in the first instance, under the doctrine that a grantor may not derogate from his grant, but added that it might also be treated as depending on the 6th section of the Conveyancing Act, 1881, and, following *Broomfield v. Williams* (*r*), held

(*p*) (1901) W. N. 237.

(*q*) [1901] 1 Ch. 834.

(*r*) *Ubi sup.*

[that the fact that the contract for the lease was entered into by reference to a plan showing that the estate, of which the land leased and the adjoining land retained formed part, were part of a building estate, did not denote a "contrary intention" under the section.

*Pollard v.  
Garc.*

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*Burrows v. Lang* (s) was a case in which the use and flow of an artificial watercourse was claimed. Farwell, J., in considering the effect of the Conveyancing Act, 1881, referred to the passage from the judgment of Cotton, L. J., in *Birmingham District and Dudley Banking Co. v. Ross* (t) above quoted, and after considering the circumstances under which the grant of the property in respect of which the easement was claimed was made (which circumstances the learned judge held that he ought to consider), held that the enjoyment of the watercourse was precarious, and that, in the circumstances, it could not have been the intention that the general words of the section should pass the right claimed.

*Burrows v.  
Lang.*

In *Godwin v. Schweppes, Ltd.* (u), the grantee of a house with windows had notice of the intention, existing at the date of the grant, to erect on the adjoining land of the grantor buildings which would to some extent interfere with the access of light to such windows; and it was held that in those circumstances he was not entitled, by virtue of sect. 6 of the Conveyancing Act, 1881, to an absolute and unlimited right to light.

*Godwin v.  
Schweppes,  
Ltd.*

The decision in *Quicke v. Chapman* (y), so far as the point now under consideration is concerned, was that a person having only a right, under a building agreement, to enter upon land adjoining property conveyed by him to a grantee, is not in a position to grant a right to light over such adjoining land, either by express grant, or by virtue of the general words implied by sect. 6 of the Conveyancing Act, 1881. The headnote to the case, so far as concerns this point, is as follows: "The provision of sect. 6, subsect. 2, of the Conveyancing Act, 1881, that a conveyance of land with houses on it shall operate to convey with the land (*inter alia*) all lights appertaining to the land or enjoyed therewith, applies only to such lights as the grantor could grant by express words, and does not operate to convey an easement of light which he has no power to grant expressly." In that case the facts were that

*Quicke v.  
Chapman.*

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(s) [1901] 2 Ch. 502.  
(t) *Ubi sup.*

(u) [1902] 1 Ch. 926.  
(y) [1903] 1 Ch. 659.

*Quicke v.  
Chapman.*

[the defendant, under a building agreement, was entitled to enter upon a piece of land and erect a certain number of houses thereon, and upon the completion of each house to have granted to him a lease thereof for 99 years. Having completed one of the houses (No. 28), he took up the lease, and assigned it to the plaintiffs; he subsequently entered upon the adjoining plot of land (No. 30), and erected thereon a house which interfered with the access of light to the plaintiffs' said house, and it was held that, for the reasons given above, he could not be prevented from doing so.

*International  
Tea Stores Co.  
v. Hobbs.*

In *International Tea Stores Co. v. Hobbs* (z), it was held that, by virtue of the general words imported into a conveyance by sect. 6 of the Conveyancing Act, 1881, the purchaser of property, occupied by him under lease, prior to, and at the time of the conveyance, was entitled to a right of way over adjoining property of his vendor, which right of way he had enjoyed during his occupation under the lease, although such enjoyment was had only by permission of the vendor.

Grounds of  
above  
decisions.  
Grantor may  
not derogate  
from his  
grant.  
Other words.

Some of the above cases, although treated as depending wholly on the Conveyancing Act, 1881 (a), might have been disposed of by reference to the maxim that a grantor may not derogate from his grant (b), and without reference to the Act.

There are cases in which words other than "used and enjoyed" have been construed, or attempted to be construed, as a grant or reservation of an easement.

Reference to  
occupation.

Among these is a reference to the mode of occupation of the premises.

*Martyr v.  
Lawrence.*

In *Martyr v. Lawrence* (c), a shop, over which was a flat leaden roof, was demised to the plaintiff "as the same as was late in the occupation of Henry Corke." Henry Corke, the former lessee, had re-granted to the landlord, during his tenancy, the right to use the leaden roof; and this right was, at the date of the plaintiff's lease, let to another tenant, together with the adjoining cottage, which belonged to the same landlord. The defendant subsequently took this cottage from the landlord, with a right to use the roof of the shop.

It was held by V.-C. Wood that the defendant had no right to

(a) [1903] 2 Ch. 165.  
(a) *Birmingham, Dudley and District  
Banking Co. v. Ross; Broomfield v.  
Williams; Born v. Turner; Pollard v.*

*Gare*, ubi sup.  
(b) Post, pp. 111 et seq.  
(c) (1864), 2 De G. J. & S. 261; 2  
Jur., N. S. 888.

[use the roof against the plaintiff; and this decision was affirmed by Lord Justice Turner, who said that the words referring to Corke's occupation, being proper, if not necessary, for the purpose of identification, the insertion of them ought to be attributed to that purpose only. Where words in a deed or instrument are properly adapted to one purpose, they ought not, unless the effect of them be clear, or the construction of them be affected by the context or by surrounding circumstances, to be held applicable to another and a different purpose. Lord Justice Knight Bruce dissented, being of opinion that the words referred to ought to receive the full construction contended for by the defendant.

*Martyr v.  
Laurence.*

In the above case, the words referring to occupation were relied on as amounting to a reservation; in *Polden v. Bastard* (d) an attempt was made to construe them as a grant. There, one Rachael Polden Bonnel died seised of two adjoining houses, one of which she occupied up to the time of her death. The other was in the occupation of one Answood, who had no supply of water on his own premises, and had been accustomed, with the permission of the common owner, to go on to her premises and draw water for the use of his house from a pump in her yard. R. P. Bonnel, by her will, devised the house in her own occupation to the plaintiff, and gave the other house, "as now in the occupation of Thomas Answood," to another person, who conveyed the house and all appurtenances to the defendant. In an action of trespass, for breaking and entering the plaintiff's close and carrying away water, the defendant pleaded an easement to do so, contending that the words above given amounted to an express devise of such an easement, and that in any case such an easement would pass either as apparent and continuous, or as being of necessity, without express words. The Court of Queen's Bench negatived both contentions; and the Exchequer Chamber (e) affirmed the decision, holding, as to the former, that the expression quoted could not be construed like the word "enjoyed," but was simply a specific description of the property devised. "I would add," said Erle, C. J., "with regard to the

*Polden v.  
Bastard.*

(d) (1863), 4 B. & S. 258; L. R. 1 Q. B. 156.

(e) Erle, C. J., Pollock, C. B., Willes, Byles, and Keating, JJ., Bramwell and Piggott, BB.



*Polden v.  
Bastard.*

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[case of *Bodenham v. Pritchard* (*f*), that the devise was of a mansion, 'together with all the buildings and lands thereunto belonging, as now enjoyed by me'; but there are no such words in the present case. If the language of this will had been, 'I devise the house as now enjoyed by Answood,' then *Bodenham v. Pritchard* might be an authority for the defendant."]

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(*f*) (1823), 1 B. & C. 350; 25 R. R. 405. This was not the case of an easement enjoyed with the property devised,

but rather a question of boundaries to property.

## CHAPTER II.

### ON THE ACQUISITION OF EASEMENTS BY IMPLIED GRANT.

THE implication of the grant of an easement may arise in two ways: 1st, Upon the severance of an heritage by its owner into two or more parts; 2ndly, by prescription (a). Implication of a grant.

#### SECT. 1.—*Disposition of the Owner of Two Tenements..*

Upon the severance of an heritage a grant will be implied: 1st, of all those continuous and apparent easements (b) which have in fact been used by the owner during the unity, though they have had no legal existence as easements; and, 2ndly, of all those easements without which the enjoyment of the severed portions could not be had at all. Severance of tenements.

The latter class are usually termed easements of necessity; the former mode of acquiring a right it is proposed to call—Disposition of the owner of two tenements,—which phrase is adopted as expressing the same origin of title as that which is designated by the French law “*Destination du père de famille*,” with the incidents to which, as defined by the Code Civil, the English law upon this subject appears to agree.

“By the ‘*destination du père de famille*’ is understood the disposition or arrangement which the proprietor of several heritages (fonds) has made for their respective use. Sometimes one heritage receives a benefit from another, without being in return subjected to an inconvenience which could amount to a species of compensation; sometimes this service is reciprocal: but these Destination du père de famille.

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(a) [There is a third class of cases where such a grant is inferred or imputed on account of acquiescence, and these are considered above, p. 65.]

(b) [As to ways, see below, subsect. (b) of this section.]

Destination  
du père de  
famille.

differences do not in any way change the nature or effect of this distribution. If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other, which was simple 'destination du père de famille,' as long as the heritages belonged to the same owner, becomes a servitude as soon as they pass into the hands of the different proprietors" (c).

Derogating  
from the  
grant.

Cases of this nature, which have come under the consideration of our Courts, have generally been treated as arising from the application of the rule, that "no man can derogate from his own grant." This maxim, however, although consistent with the doctrine stated, [was considered by the author to be insufficient to account for the principle advanced by him, that the obligation is imposed equally on the grantee and the grantor (d). And although, having regard to recent decisions, this principle is no longer tenable, the maxim in question may still be thought to be more directly applicable to those cases where] there is no "apparent sign of servitude," but, unless the easement be presumed, the grantor would in fact derogate from his own grant. [Such are the cases in which a grant has been implied from the abutments given in a conveyance (e), or

(c) *Pardeusius, Traité des Servitudes*, s. 228.

(d) See below, sub-sect. (c).

(e) In *Roberts v. Karr* (1809), 1 Taunt. 496; 10 R. R. 592, Pratt had released to Compigné land of unequal width, describing as abutting east on a new road on Pratt's own soil. It abutted in the widest part on the road; but in the narrower part a strip of the grantor's land (which he alleged that he had intended to reserve) intervened between the road and the premises granted. It was held that, even admitting that Pratt had intended to reserve the land, yet he and those claiming under him were concluded by the description in Compigné's release from preventing Compigné or his assigns from coming out into the road over the strip of land. "Is it not," asked Lord Mansfield, C. J., "a sufficient answer to say, 'You have told me in your lease, this land abuts on the road; you cannot now be allowed to say that the land on which it abuts is not the road.'"

In *Harding v. Wilson* (1823), 2 B. & C. 96; 3 D. & R. 287; 26 R. R. 287, a lease of premises to one Bolton described them as abutting on "an intended way

of 30 feet wide," the soil on that side of the premises demised being the property of one Sloane, the lessor. The defendant, as tenant of the adjoining land under a subsequent demise from Sloane, afterwards built to within 27 feet of the land demised to Bolton. The plaintiff, an underlessee from Bolton, having brought his action claiming a right of way over the whole 30 feet, it was admitted that he was entitled (independently, as it seems, of the description) to a convenient way, his premises not being otherwise accessible from the high road; but it was held that he was not entitled to more. "Adverting," said Abbott, C. J., "to the lease from Sloane to Bolton, the former does not grant a way 30 feet wide, but only described the land demised as bounded by an intended way of that width. There is merely an expression and declaration of intention."

The argument was somewhat complicated by the fact that the plaintiff's underlease did not specify any particular width; but this was held to be immaterial. This case does not seem to have received very much consideration.

In *Espley v. Wilkes* (1872), L. R.

[from the description of the grantee (*f*) or the purpose of the grant (*g*).

Derogating  
from the  
grant.

7 Exch. 298, the defendant's lease described the premises demised as "bounded on the east and north by newly-made streets," and the new streets were shown on the plan endorsed. The lessee covenanted to kerb the causeways adjoining the land demised. The way to the east was never made or marked out, and the site was subsequently leased by the same landlord to the plaintiff. It was held that the effect of the defendant's lease was to give him a private right of way over both streets; for the lessor was by his own description estopped from denying that there were streets which were in fact ways.

Kelly, C. B., relied on *Harding v. Wilson* as an authority for the defendant, apparently treating that decision, so far as it affirmed the plaintiff's right to a convenient way, as proceeding on estoppel. But it is difficult to understand why, if the lessor in that case was estopped from denying that the plaintiff was entitled to some way, he was not equally estopped from denying that the way should be 30 feet wide. It is conceived that the "convenient way" in *Harding v. Wilson* was a way necessary.

The above cases were referred to by Cave and A. L. Smith, JJ., in *Roe v. Siddons* (1880), L. R. 22 Q. B. Div. 224; but the decision ultimately turned on another point. See also *Cooke v. Ingram* (1893), 68 L. T. 671.

In *Mellor v. Walmesley*, [1905] 2 Ch. 164, it was held that, in a conveyance in which the land granted was described as bounded "on the west by the seashore," the word "seashore" meant "foreshore" in its strict legal sense, i.e., the land situate between medium high and low water-marks; but that (applying *Roberts v. Karr*, *sup.*) the grantor was estopped or precluded from asserting that the land to the west of the plot was not seashore, and the grantee was entitled to unrestricted access to the sea from the western boundary of his property. See also *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165, 173.

In an American case, *Lennig v. Ocean City Association* (41 N. J. Eq. 606), the defendants, a religious camp-meeting association, had mapped out their property in lots, reserving certain lots as a "camp-ground" for religious meetings, and had sold to the plaintiff by this map other lots fronting on the lots

so reserved; it was held that the defendants could not let the reserved lots for building purposes.

(*f*) See *Herz v. Union Bank of London* (1859), 2 Giff. 686, where the lessee was described as a diamond merchant; *Hall v. Lund* (1863), 1 H. & C. 676 (quoted below, p. 124), where he was described as a bleacher.

(*g*) In *Robinson v. Grave* (1873), 21 W. R. 223; 27 L. T. N. S. 648; Wickens, V.-C., said, "It seems to me, upon general principles, that a grant made expressly for the purpose of the grantee's building a house creates a legal easement over the adjoining land retained by the grantor, to such an extent as may be strictly necessary for enabling the grantee to build the house and enjoy it when built; and, when the grant does not notice the intention of building, but both grantor and grantee knew that the purpose is building, an equitable right is obtained co-extensive with the legal right which would have been obtained if the grant had noticed the intention of building." In this case the houses were built between contract and conveyance. Cf. *Siddons v. Short* (1877), L. R. 2 C. P. D. 572, where land was sold for an iron-foundry, and the grantee was held entitled to support; and *Aldin v. Latimer Clark, Muirhead & Co.*, [1894] 2 Ch. 437, where a grantee, having covenanted to carry on a timber trade, was held entitled to the access of air to his timber-sheds.

In *Frederick Betts, Ltd. v. Pickfords, Ltd.*, [1906] 2 Ch. 87, lessees, under a lease which contained a covenant to build a warehouse according to approved plans, which showed certain windows, were held entitled by implied grant, as against the lessors, to an unqualified right to light to those windows; and the lessors having connected a building of their own, erected on adjoining land, with the warehouse, and the lessees having, on that account, been called upon, under the provisions of the London Building Act, 1894, to block up the windows in question, the lessors were ordered to disconnect their building from the warehouse.

The principle of the maxim that a grantor may not derogate from his grant, has been extended so as to render a lessor liable, at the suit of his lessee, for damages caused by acts of nuisance committed by the lessor on adjoining

Qualified  
necessity.

[Mr. Willes, a former editor of this treatise, explained the decisions in question by the theory of what he called "qualified necessity." The easement, he said, although not absolutely necessary (as in the case of a land-locked tenement) is "necessary for the use of the tenement in the state it is in when severed," necessary, that is, "for the enjoyment of it in all its parts." This explanation of the doctrine of implied grant has the advantage of accounting naturally for the cases on ways noted in the following sub-section. It was explicitly stated by the Court in the case of *Ewart v. Cochrane*, noted below; and it has been accepted by the judges in some of the later cases, as by the Master of the Rolls in *Suffield v. Brown (h)*, and by Thesiger, L. J., in *Wheeldon v. Burrows (i)*.

property, for the consequences of which acts he would not, or might not, have been liable, had the relationship of lessor and lessee not existed: *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836.

In *Williams v. Earl of Jersey* (1841), 1 Craig & Phill. 91; 54 R. R. 219, a somewhat similar point was raised, but not determined.

The limits of the doctrine are shown in *Popplewell v. Hodgkinson* (1869), L. R. 4 Exch. 248; and *Robinson v. Kilvert* (1889), L. R. 41 Ch. Div. 88, where the grantor had no notice at the date of the grant that the grantee's trade of a paper-merchant would be interfered with by an ordinary and reasonable use of the adjoining property.

The implication of a grant is subject to the terms of the instrument and to the circumstances under which it is executed. See below, p. 134.

The doctrine laid down in these cases applies equally where the conveyance of the property requiring the easement is taken by a public body, as by a railway or canal company, under its compulsory powers: *Caledonian Railway v. Sprot*, 2 Macq. 449; *Same v. Lord Belhaven*, 3 Macq. 56; *Eliot v. North-Eastern Railway* (1863), 10 H. L. C. 333; *Serff v. Acton Local Board* (1886), L. R. 31 Ch. D. 679; *North British Railway v. Turners, Ltd.*, (1905) 6 F. 900 (Ct. of Sess.), *Mews' Digest* (1905), col. 256.

And, where an Act of Parliament empowers a public body, without taking a conveyance, to carry a sewer through private property, making compensation for damage, the legislature means to give to the public body all rights with-

out which the power would be unavailable, including a right at least to vertical support: *Midland Railway v. Checkley* (1867), L. R. 4 Eq. 19; *Benfield-side Local Board v. Consett Iron Co.* (1877), L. R. 3 Exch. D. 54; *In re Corporation of Dudley* (1881), L. R. 8 Q. B. Div. 86; *Normanton Gas Co. v. Pope* (1883), 52 L. J., Q. B. 629; *London and North-Western Rail. Co. v. Evans*, [1893] 1 Ch. 16; *Glamorganshire Canal Navigation Co. v. Nizon's Navigation Co., Ltd.* (1901), 85 L. T. 53; *Clippens Oil Co., Ltd. v. Edinburgh and District Water Trustees*, [1904] A. C. 64; cf. *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600. See the Waterworks Clauses Act, 1847, ss. 18 to 27, and the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883; and below, Part III. Chap. IV. In *Metropolitan Board of Works v. Metropolitan Rail. Co.* (1869), L. R. 4 C. P. 192, the decision was against the claim to lateral support; but there the sewer could have been constructed without the support claimed, and no right to compensation was given to the person from whom the support was claimed (L. R. 5 Ch. D. 332; [1893] 1 Ch. 29, 33).

In some cases the legislature has made the right to support conditional on the performance by the public body of a duty, as the repair of the banks of a canal (*Staffordshire Canal Co. v. Hallen* (1827), 6 B. & C. 317; 30 R. R. 333), or the deposit of plans (*South Staffordshire Waterworks Co. v. Mason* (1886), 56 L. J., Q. B. 255).

(h) (1863), 9 Jur., N. S. at p. 1001.

(i) (1879), L. R. 12 Ch. Div. at p. 49.

[It is proposed, first, to deal with the implication of a grant of easements which are undoubtedly both continuous and apparent; secondly, to consider how far a way comes within the rule; and thirdly, to ascertain whether the doctrine operates in favour of the grantor as well as of the grantee.] Order of treatment.

(a.) *Implied Grant of continuous and apparent Easements.*

An easement is a quality superadded to the usual rights, and as it were passing the ordinary bounds of property; and with the exception of those easements, the enjoyment of which depends upon an actual interference of man at each time of enjoyment, as of a right of way (k), it is attended with a permanent alteration of the two heritages affected by it, showing that one is benefited and the other burdened by the easement in question. This permanent quality affecting the two heritages is sometimes affixed by nature itself, as in the case of water, "which holds its natural course," and, as it is observed by *Brudenell* in 12 H. 8, "naturâ suâ descendit" (l); sometimes it is artificially affixed, as by the erection of a roof or the placing of a gutter throwing the rain water on the neighbour's land. Implied grant of continuous and apparent easements.

To clothe with right this permanent alteration of the qualities of two heritages, the consent of the owner of the servient tenement, in the manner appointed by law, is necessary; but where the land benefited and the land burthened belong to the same owner, he may change the qualities of its several parts at his will, and his express volition evidenced by his acts must at least be as effectual to impress a new quality upon his inheritance as the implied consent arising from long-continued acquiescence.

It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement; for no man can have an easement in his own property, but he obtains the same object by the exercise of another right, the general right of property. But he has not the less thereby permanently altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, and in their nature permanent changes in the disposition of the

(k) [As to which, see the next subsection.]

(l) *Sury v. Pigott* (1625), Popham, 169, per Whitlocke, C. J.

Continuous  
and apparent  
easements.

property, so that one part thereby becomes dependent upon another, that a purchaser should take the land with the qualities which the previous owner had undoubtedly the right to attach to it.

This reasoning applies to those easements only which are attended by some alteration which is in its nature obvious and permanent,—or, in technical language, to those easements only which are apparent and continuous; understanding by apparent signs not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject (*m*).

The cases in which it has been held that easements of this nature are not extinguished by unity of ownership, unless the party has availed himself of his right of property to destroy the external mark of the easement, as by cutting a spout or removing the eaves of a house, are authorities in support of this doctrine.

The easement as such can in no case exist during the unity of ownership; and, if the owner might at any moment determine the easement by altering the relative disposition of the parts of his tenement inter se, what difference can it make whether he has suffered things to continue as they were previous to the union, or whether he has made one portion of his estate subject to the convenience of another by some express act done during the union? In either case he has acted by virtue of his general rights of property.

Unless it can be said that it makes a difference, that in the one case previous to the union a valid easement had been constituted, it is difficult to see on what ground any distinction can be contended for between the cases; but in a case on the subject, the authority of which has been frequently recognized, it is clear that no such right existed before the union, and that what was in fact a wrongful act—a nuisance—before the union, ceased to be so and was clothed with a legal title upon a subsequent separation (*n*).

The earliest case directly in point upon this subject, and one which is repeatedly cited, and upon which great reliance is placed in subsequent cases, was decided in the 11 H. 7; and although an attempt was made in argument in some of the later cases to dis-

(*m*) [Accidental non-user at the time of the severance, as in the instance of a drain not running by reason of the house not being then occupied, appears immaterial.]

(*n*) *Robins v. Barnes* (1616), Hobart, 131; post, p. 119; [cf., on a similar point, *Kay v. Oxley* (1875), L. R. 10 Q. B. 360, quoted above, p. 97.]

tinguish it as a case of custom, the authority attached to it by the judges shows that they did not consider its applicability as at all restricted on that ground:—

Continuous  
and apparent  
easements.

One William Coppy brought an action on the case against J. de B., and counted that according to the custom of London, where there were two tenements adjoining, and one had a gutter running over the tenement of the other, the other cannot stop it, though it be on his own land; and counted how he had a tenement and the defendant another tenement adjoining. The defendant's counsel said, "We say that since the time of memory one A. was seised of both tenements, and enfeoffed the plaintiff of the one and defendant of the other." To which it was replied, "This is not a good plea, for the defendant seeks to defeat the custom by reason of an unity of possession since the time of memory; and that he cannot do in this case, for such a custom, that one shall have a gutter running in another man's land is a custom solemnly binding the land, and this is not extinct by unity of possession; as if the lord of a seignior purchase lands held in gavelkind, the custom is not thereby extinguished, but both his sons shall inherit the lands, for the custom solemnly bindeth the lands." *Townshend* said, "If a man purchase land of which he hath the rent, the rent is gone by the unity of possession, because a man cannot have a rent from himself; but if a man hath a tenement from which a gutter runneth into the tenement of another, even though he purchase the other tenement, the gutter remains, and is as necessary as it was before." To this it was objected by the defendant's counsel, "That he who was the owner of the two tenements might have destroyed the gutter; and that if he had done so, and then made several feoffments of the two tenements, the gutter could not have revived." To which it was replied, "If that were so, you might have pleaded such destruction specially, and it would have raised a good issue." 11 H. 7, 25, pl. 6.

*Coppy v. J. de B.*, 11 H. 7.

The case of warren, relied upon as illustrating the argument of the existence of an easement notwithstanding the unity, is as follows, 35 Hen. 6, 55, pl. 1:—

Case of  
warren.

An action of trespass was brought for hunting in the plaintiff's warren and carrying away his hares and rabbits. The defendant pleaded in abatement, that the place where, &c. was the manor of D., in which manor the plaintiff had nothing, except as joint tenant with two others. On demurrer, judgment of respondeat ouster was given. The objection to the plea was, that although



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the plaintiff was but a joint tenant of the land, he might still be sole owner of the warren; and that, as it did not appear by the plea whether he was so or not, and a plea in abatement to be good must be "bon a cescun comon entent," the plea was bad. A man, it is there said, may have warren either by grant of the king in his own land, or by prescription in the lands of another. Common and rent are not like a warren, for if one has a certain rent issuing out of land, and he purchase the land the rent is gone; and the same law of a common, for a man cannot pay rent to himself or have common on his own land; but one may have warren either in the land of another man or his own, for it is not issuing out of the land, neither is it payable; but it is, as has been said, realty and privilege in the land, and nothing else.

[A free warren, being a franchise, which (like that of forest, chase and the like) subsists as a distinct and separate inheritance at the same time with the ownership of the land over which it extends in those cases where it happens to belong to the owner of that land, does not furnish any analogy. Positive easements, authorizing acts on the land of another, which the ordinary right of property enables a man to do on his own land, necessarily merge when the land upon which they are exercisable becomes vested in their owner; but the franchise of free warren confers privileges, the right to which could not be claimed on a man's land by virtue of his ownership of the land, and which are wholly unconnected with that ownership.]

*Nicholas v.  
Chamberlain.*

In *Nicholas v. Chamberlain* (*o*), which was an action of trespass, "it was held by all the Court upon demurrer that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house (*p*), the conduit and pipes pass with the house; because it is necessary and quasi appendant thereunto; and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So it is if a lessee for years of a house and land erect a conduit upon the land, and after the term determines the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one and the land to another, the vendee shall have the

(*o*) (1607), Cro. Jac. 121.

(*p*) [As to the second case, see below, sub-sect. (*o*).]

conduit and the pipes and liberty to amend them. But, by *Popham*, if the lessee erects such a conduit, and afterwards the lessor, during the lease, sells the house to one, and the land, wherein the conduit is, to another, after the lease determines he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation or usage of them together by him who had the inheritance. So it is if a disseisor of a house and land erects such a conduit, and the disseisee re-enter, not taking conusance of any such erection nor using it, but presently after his re-entry sells the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit; but in the principal case, by reason of the mispleading therein, there was not any judgment given."

Continuous  
and apparent  
easements.

The case of *Robins v. Barnes* (q) is thus reported in Rolle:—"If A. is seised in fee of a house which hath certain windows by prescription, and B. hath another house close adjoining to that, and B. tortiously erects a structure on his own frank tenement, which overhangs the house of A. and thereby stops his light, and afterwards B. purchase in fee the house of A., and afterwards grant by lease to C. the house which was the house of A.; C. has no remedy to abate this nuisance, for by the unity of possession the prescription for the windows was extinct; being that C. ought to take that in such plight as it was at the time of the grant made to him, *for the unity purges the tort*, both being in the hand of one person, who might deal with it at his pleasure."

*Robins v.  
Barnes.*

"So it is if B. afterwards pull down his house and rebuild it in the same manner as it was before, so that he does not make it overhang more than it did at the time of the grant to C.; but if he causes it to overhang more than before, an action lies for C. to have this remedied, for it is a new tort."

In the report in Hobart the Court agreed: "That though one of the houses had been built overhanging the other wrongfully before they came into one hand, yet after, when they came both into the hand of Allen, that wrong was now purged, so that *if the houses came afterwards into several hands, yet neither party could complain of a wrong before.*" It is to be observed, that in this case

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(q) (1616), Roll. Abr., tit. Extinguishment, D. 936, pl. 7; S. C., Hobart, 131; Vin. Abr. Extinguishment, D. pl. 7.

Continuous  
and apparent  
easements.

*Robins v.  
Barnes.*

the action was brought not only for disturbing the easement of ancient light, but also for an infringement of the common law rights of property, by making a roof overhanging the plaintiff's soil; and the decision is not only an authority for the position, that the abstinence of the owner of the united tenements from removing the obstruction to the windows was an extinguishment of the prescriptive right to the light, but also that by his permitting the overhanging roof to continue, and severing the tenements in that condition, the encroachment of the overhanging roof, though tortious at the time the tenements first became his property, was legalized.

*Sury v. Pigott.*

In *Sury v. Pigott* (r), an action was brought for obstructing a stream of water running over the defendant's land to a pool of the plaintiff's, situate in a close which was part of the plaintiff's rectory. The defendant pleaded that the land over which the water ran, and the plaintiff's close, were both part and parcel of the manor of Markham, and that King Henry VIII., being seised of the said manor in his demesne as of fee, granted the land over which the water ran to one under whom the defendant claimed; and the question was, whether the unity of ownership in the king had extinguished the easement.

For the plaintiff it was argued, that the easement was not extinct because it was a thing of necessity, and though a rent and a way may be extinguished by unity, the easement had a separate and distinct existence; and it was likened to the case of warren, or a right to drive beasts to pasture in a forest, which rights are not extinguished by unity. So also of a gutter, which, like a watercourse, has a separate existence.

On the other side it was argued, that it was extinct by unity, because it was a charge on the soil of another, as a right of way or enclosure, both of which have been held to be extinguished by unity; and although the custom of gavelkind is not extinguished by purchase of the seignior, yet it is otherwise of a prescription, which follows the estate in the land and the person.

It was resolved by the whole Court that the watercourse was not extinguished, but Dodderidge, J., said, "That a way, if it were of convenience (voy de ease), is extinguished, but not a way of

(r) (1625), Palmer, 444; S. C., Pop-  
ham, 166; 3 Bulstrode, 339; Noy, 84;  
Latch, 163; W. Jones, 145. [This is  
not, properly speaking, a case of ease-

ment, but one of natural right (above,  
p. 5); but the Judges' dicta relate to  
easements.]

necessity." And so it was the opinion of Topham, C. J., in the *Lady Brown's* case, "If a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is extinct, because he thereby declares his intention and purpose that he does not wish to enjoy them together, viz., the watercourse and the land." Dodderidge, J., argued that a fence should be extinguished by unity, because it is not of necessity, and put this case: "A man having a mill and a watercourse over his land, sells a portion of the land over which the watercourse runs; in such a case by necessity the watercourse remaineth to the vendor, and the vendee cannot stop it." Whitlocke, C. J. (s), said, "A way or common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also; but in our case the watercourse doth not begin by consent of parties nor by prescription, but ex jure naturæ, and therefore shall not be extinguished by unity. A warren is not extinguished by unity, because a man may have a warren in his own land; and in the case 11 H. 7, the gutter was not extinguished only by the unity of possession, but there also appeareth in the case that the pipes were destroyed, whereby it could not be revived."

Continuous  
and apparent  
easements.  
*Sury v. Pigott.*

In *Cox v. Matthews* (t), which was an action for stopping lights, an exception was taken to the declaration, because it did not state the plaintiff's house to be ancient. Hale said, "That if a man builds a house upon his own ground, he that hath the contiguous ground may build upon it also, though he doth thereby stop the lights of the other house; for cuius est solum ejus est usque ad cælum, and this holds unless there be a custom to the contrary, as in London. But in an action for stopping of his light, a man need not declare of an ancient house; for if a man should build a house on his own ground, and then grant the house to A., and grant certain land adjoining to B., B. could not build to the stopping of its lights in that case."

*Cox v.*  
*Matthews.*

In *Palmer v. Fletcher* (u), which was an action on the case for stopping lights, it appeared that a man erected a house on his own land, and afterwards sold the house to one and the land adjoining to another, who obstructed the lights of the house; and it was

*Palmer v.*  
*Fletcher.*

(s) Popham, 170.  
(t) (1684). 1 Ventris, 237, 239; S. C.,  
3 Keble, 133, as to a point of pleading  
only.

(u) (1675), 1 Levinz, 122; 1 Siderfin,  
167, 227, nom. *Palmer v. Flessiers*; 1  
Keble, 553, 625, 794, nom. *Palmer v.*  
*Flessier.*

Continuous  
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*Palmer v.  
Fletcher.*

resolved, "that though it was a new passage, yet no person who claimed the land by purchase, under the builder, could obstruct the lights any more than the builder himself could, who could not derogate from his own grant, for the windows were a necessary and essential part of the house." Kelynge, J., said, suppose the land had been sold first, and the house after, the vendee of the land might stop the lights. Twysden, J., to the contrary, said, whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees, and cited a case to be so adjudged; but all agreed that a stranger, having lands adjoining to a messuage, newly erected, may stop the lights, for the building of any man on his lands cannot hinder his neighbour from doing what he will with his own lands; otherwise, if the messuage be ancient, so that he has gained a right to the lights by prescription. And, afterwards, a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.

*Peyton v.  
Mayor of  
London.*

In *Peyton v. Mayor of London* (x), which was an action for withdrawing support by pulling down an adjoining house, the declaration contained no allegation of any right to support, or of any fact from which that right might be inferred in law; it therefore was unnecessary to decide what the result would have been had the two houses originally belonged to the same owner. Lord Tenterden, in delivering judgment, alludes to such a state of facts, apparently inclining to favour the existence of such a right, if there had been at some former time a unity of the ownership of the two houses. [And the judgment of the Court of Exchequer in *Richards v. Rose* (y) is an authority to show, that upon the severance of ownership of two or more houses, obviously and necessarily requiring mutual support, there is, by an implied grant or reservation, as the case may be, the right to support; and that such "right equally subsists, whether the owner parts first with one and then with the other, or with two together, the last being afterwards divided." This case was treated by the Court as one of absolute necessity.]

(x) (1829), 9 B. & C. 736; 33 R. R. 311.

(y) (1853), 9 Exch. 220. See, in support of this case, the observations of Lord Westbury in *Suffield v. Brown*

(1864), 4 D. J. & S. at p. 198, and those of Thesiger, L. J., in *Wheeldon v. Burrows* (1879), L. R. 12 Ch. Div. at p. 59; and see below, Part III. Chap. IV. Sect. 3.

In *Canham v. Fiske* (z), the plaintiff purchased a garden, through which ran a stream of water, from a person who was also the owner of an adjoining field, in which the spring supplying the stream took its rise; the defendant, having bought the field, diverted the stream, after the plaintiff had used the water for about nineteen years. At the trial, the learned Judge was of opinion, that as, at the time of the plaintiff's purchase, the two closes were the property of the same owner, the unity of ownership destroyed the prescriptive right, and consequently nonsuited the plaintiff. The Court of Exchequer granted a new trial. Lord Lyndhurst observed, "The plaintiff bought the land with the water upon it; and if the conveyance were silent as to the water, still the water would pass by the grant of the land. If the conveyance had been produced, and had been silent as to the water, still the conveyance would have passed the water which flowed over the land. Are we to assume that the water was excepted out of the conveyance merely because the conveyance was not produced?" And Bayley, B., added, "If I build a house, and, having land surrounding it, sell the house, I cannot afterwards stop the lights of that house. By selling the house I sell the easement. The land is purchased with the water running upon it, and the conveyance passes the land with the easements existing at the time."

Continuous  
and apparent  
easements.

*Canham v.  
Fiske.*

[In *Blanchard v. Bridges* (a), the rule was again cited. But there the windows in question had been altered after the date of the conveyance from which the implication of a grant arose; and the Court said that the implication must have reference to the state of things at the time of the conveyance. The question of the effect upon a grant of light of an alteration of the windows had not then been fully considered (b).

*Blanchard v.  
Bridges.*

In *Ewart v. Cochrane* (c), the respondent claimed the right to send the refuse of his tan-yard through a drain into a cesspool in the appellant's garden. Both tenements had belonged to one Murray, who had conveyed the tan-yard to the respondent's predecessor, "and that as the whole said subjects are previously possessed by us," but without alluding to the drain; he afterwards

*Ewart v.  
Cochrane.*

(z) (1831), 2 C. & J. 126; 37 R. R. 655; Preface VIII. [The right in this case appears to have been an ordinary right of property, and not an easement.]

(a) (1835), 4 A. & E. 176; 53 R. R.

208.

(b) See below, Part V. Chap. II.

(c) (1861), 7 Jur., N. S. 925; 4 Macq. S. A. 117.

Continuous  
and apparent  
easements.

*Ewart v.  
Cochrane.*

[conveyed the garden to the appellant, who stopped the drain. The House of Lords decided in favour of the respondent.

The observations made in this case by Lord Campbell, C., would carry the law a good deal further than it has yet been carried. "I consider the law of Scotland," he said, "as well as the law of England, to be that, when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was held and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there be the usual words in the conveyance. I do not know whether the usual words are essentially necessary; but where there are the usual words, I cannot doubt that that is the law." The reference to "comfortable enjoyment" appears to set up a somewhat vague test of the qualified necessity (*d*); and Lord Campbell's observations, as reported, make no distinction between continuous and apparent easements, which will pass without words of grant, and other conveniences (such as "non-apparent" ways), which will not pass without a grant of ways, &c. "used and enjoyed" with the premises. Lord Chelmsford treated the easement as absolutely necessary for the enjoyment of the tan-yard.

*Hall v. Lund.*

In *Hall v. Lund* (*e*), the owner of two mills had leased one to the defendant. In the lease he was described as a bleacher, and the premises leased as lately occupied by Pullan. Pullan had formerly carried on the business of a bleacher in this mill, and had drained his refuse into a watercourse which supplied the other mill. The lessor afterwards sold the mills to the plaintiff, who sued the defendant for polluting the watercourse with the drainage from his bleaching works, to the injury of the other mill. The action failed, on the ground that the defendant's lease contained an implied grant of the right to use the watercourse for carrying on the business of a bleacher; and, on a rule obtained, the Court upheld the verdict. Three of the judges (*f*) considered the easement claimed by the defendant to be apparent and continuous within the principle of the above cases; and, independently of this, they considered that, the lessor having demised the premises for the purpose of bleaching, neither he nor those claiming under him could derogate from his grant (*g*). The remaining judge (*h*) based

(*d*) Above, p. 114.

(*e*) (1863), 1 H. & C. 676.

(*f*) Pollock, C. B., Channell, B., and

Wilde, B.

(*g*) See above, p. 113, note (*g*).

(*h*) Martin, B.

[his concurrence on the dictum in *Ecart v. Cochran*, which is commented on above.

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and apparent  
easements.

It should be noted that in both these cases the right claimed was, not merely to use water, but to pollute it.

In *Davies v. Marshall* (i), the plaintiff's lease contained an express grant of "ancient lights"; but this was held not to negative the implied grant of the new lights.

*Davies v.  
Marshall.*

In *Polden v. Bastard* (k), a case relating to a non-continuous easement, Erle, C. J., said:—"There is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction; and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law, without any words of grant; but, with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass."

*Polden v.  
Bastard.*

In *Watts v. Kelson* (l), the owner of two closes, having made an artificial watercourse for the supply of cattle-sheds, conveyed first the cattle-sheds to the plaintiff (m), and afterwards the close through which the watercourse ran to the defendant. It was held, on appeal from Romilly, M. R., that the plaintiff was entitled to have the enjoyment of the watercourse in the same manner as it was enjoyed during the unity of possession. Mellish, L. J., delivered the judgment of the Court; and, after citing the judgment in *Polden v. Bastard* (n), above referred to, continued:—"We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement, extending to the dominant tenement, by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement." He referred to *Nicholas v. Chamberlain* (o) and *Wardle v. Brocklehurst* (p).

*Watts v.  
Kelson.*

Since the decision in *Watts v. Kelson*, the principle of the implied grant of continuous and apparent easements in a case

Other cases.

(i) (1861), 7 Jur., N. S. 720, 1247; 9 W. R. 368, 866; 4 L. T., N. S. 105, 581. Cf. *Brown v. Alabaster* (1887), L. R. 37 Ch. D. 490; *Thomas v. Owen* (1887), L. R. 20 Q. B. Div. 225.

(k) (1863), 4 B. & S. 258; L. R. 1 Q. B. 166; above, p. 109.

(l) (1870), L. R. 6 Ch. 166.

(m) The conveyance granted water-courses used and enjoyed with the tenement conveyed, but the decision did not turn on this.

(n) (1863), L. R. 1 Q. B. 166.

(o) Above, p. 118.

(p) Above, p. 88.



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easements.

[where the quasi-dominant tenement is first conveyed away, has been treated as settled law (*g*); and the Courts have been occupied mainly with the subsidiary questions now to be mentioned, or with the doctrine of implied reservation treated in a later section.]

Dominant or  
servient tene-  
ment in lease.

In the first place, it seems that, in the absence of any special circumstances, the rule holds notwithstanding that the dominant or the servient tenement is in lease at the date of the grant. The implied grant cannot, of course, operate for or against the lessee, but it takes effect immediately on the determination of his interest.]

*Coutts v.  
Gorham.*

In *Coutts v. Gorham* (*r*), which was an action for obstructing lights, it appeared that one Hall was the owner of two adjoining houses, each of which had certain ancient windows. In 1800, he made a lease of one of these houses for twenty-one years, determinable on lives, of which lease the defendant was assignee; and in November, 1809, the defendant took a new lease of the same house for twenty-one years. The windows of the other house had been altered, and placed in a different situation at a period (as it appeared) within twenty years before the obstruction complained of; but the jury found the alteration to have taken place previous to the lease to the plaintiff, which was granted in May, 1809. Tindal, C. J.,

(*g*) See, e.g., *Robinson v. Grave* (1873), 21 W. R. 223; 27 L. T., N. S. 648 (where the lights were opened between contract and conveyance); *Bayley v. Great Western Railway* (1884), L. R. 26 Ch. Div. 434 (per Chitty, J., at p. 438); *Myers v. Catterson* (1889), L. R. 43 Ch. D. 470 (where the vendors were a railway company); *Bailey v. Icke* (1891), 64 L. T. 789 (where the building was contemplated but not erected at the date of the conveyance); *Phillips v. Low*, [1892] 1 Ch. 47 (a case of devise); *Corbett v. Jonas*, [1892] 3 Ch. 137 (where a claim by implied grant to an extraordinary amount of light was negatived); *Broomfield v. Williams*, [1897] 1 Ch. 602 (where a grant of light was implied although the land retained was described on the plan as "building land"); *Pollard v. Gare*, [1901] 1 Ch. 834 (where the land was described by reference to a plan in which the estate was marked out in building plots); *Burrows v. Lang*, [1901] 2 Ch. 502 (where the rule was held not to apply to a watercourse constructed for a special temporary purpose); *Key v. Neath Rural District Council*, [1905] 93 L. T. 607; *affd.* 95 L. T. 771 (where the

implication of a grant was assisted by general words in the conveyance); *Betts, Ltd. v. Pickfords, Ltd.*, [1906] 2 Ch. 87, cited above, p. 113, note (*g*), (where the lease to the plaintiffs contained a covenant to erect a warehouse according to approved plans). The rule applies although there is land intervening between the house sold and the land retained (*Birmingham, Dudley, and District Bank v. Ross* (1883), L. R. 38 Ch. Div. 295), and although the vendor is only equitably entitled (*Beddington v. Atles* (1887), L. R. 35 Ch. D. at p. 322; *Wilson v. Queen's Club*, [1891] 3 Ch. 522). But not where the vendor has at the date of the conveyance an interest in the property retained insufficient to enable him to make an express grant of the easement claimed, although he subsequently acquires an interest sufficient for the purpose (*Quicke v. Chapman*, [1903] 1 Ch. 659). A merely equitable grant may be defeated by a legal conveyance of the servient property to a purchaser for value without notice (*Prinsep v. Belgravia Estate, Ltd.*, W. N. (1896) p. 39).

(*r*) (1829), *Moo. & Malkin*, 396.

said, "If the windows were in existence at the time of the lease to the plaintiff, he is entitled to recover. Hall, who executed the lease when the windows were there, could not himself obstruct them afterwards; and if so, he could not convey to any other possessor a right to do so."—"It is true that the defendant had an existing term at the time, and his interest in that term would not be affected by Hall's lease; but he surrendered that term by operation of law, when he accepted a new lease from Hall."—"The defendant's new lease was derived out of Hall's reversion; and Hall's reversion was subject to the right already granted by him to the plaintiff. Assuming, then, that the windows were made within twenty years, but before the lease made to Coutts, Gorham's present interest is derived from the same lessor at a subsequent period, and is therefore subject to the rights which Coutts already had against his lessor, and consequently, to that of his having the windows in question free from any obstruction" (s).

Continuous  
and apparent  
easements.

*Coutts v.  
Gorham.*

[To the same effect is *Davies v. Marshall* (t), where the quasi-servient tenement was in lease at the date of the conveyance of the quasi-dominant tenement; but the tenant of the former, having afterwards surrendered his lease, and taken a new one, was restrained from obstructing the windows of the latter.

*Davies v.  
Marshall.*

In *Barnes v. Loach* (u), where the dominant or quasi-dominant property was let at the date of the severance, Cockburn, C. J., and Lopes, J., declined to hold that this excluded the principle of the disposition of the owner.

*Barnes v.  
Loach.*

The rule also applies where the quasi-dominant tenement and the quasi-servient tenement, having been both included in a mortgage, the mortgagee *bonâ fide* sells the quasi-dominant tenement under his statutory power of sale (x). In such a case the mortgagee is, in effect, agent for the mortgagor for the purpose of the maxim that a grantor may not derogate from his grant.

Dominant and  
servient tene-  
ment in  
mortgage.

But the duration of the implied grant is limited by the estate which the vendor had in the quasi-servient tenement at the time of

Duration of  
implied grant

(s) But compare *Thomas v. Owen*, cited post, p. 169, on the reasoning in which a reservation by Hall might have been implied, out of the lease to Coutts, of the rights already granted to Gorham, not only for the term which Gorham had under his lease of 1800, but for the whole of the term granted to Coutts by the lease of May, 1809.

(t) (1861), 7 Jur., N. S. 720, 1247; 9 W. R. 368, 866; 4 L. T., N. S. 105, 581. Cf. *Cable v. Bryant* (1907), W. N. 238.

(u) (1879), L. R. 4 Q. B. D. 494. In *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, it does not appear that the plaintiff claimed by implied grant.

(x) *Born v. Turner*, [1900] 2 Ch. 211.

Continuous and apparent easements. [the severance; and, if he subsequently acquires a larger estate, such estate will not be bound by the servitude (x).]

And, following out this principle, it has been held that, where the grantor has at the date of the conveyance of the quasi-dominant tenement, contracted to sell the quasi-servient without reserving the easement, the servitude does not pass. For, in such a case, the common vendor is, by virtue of his contract, a trustee of the quasi-servient tenement for the purchaser of that tenement; and the Court will not imply a grant which would be an alienation of the property of another. The rule assumes that the grantor is the common owner of both tenements; and both the purchaser and the Court are "thrown upon inquiry" whether this is so. If the quasi-servient tenement is sold, the assumption fails; a stranger is the owner, and there is no implication (y).

"In order to see whether a grant of light over the adjacent land is to be implied, you must inquire . . . into the title to that adjacent land, to see whether the grantor has such an estate or interest in it as will support an implied grant by him of the right to the access of light over it" (z).

Simultaneous conveyances.

In the next place, it has been decided that the general rule holds good even where the quasi-dominant and quasi-servient tenements are sold or conveyed at one and the same time.

Compton v. Richards.

The first case which bears upon this question is] *Compton v. Richards* (a), which differs from many of the authorities already cited by reason of the easement, for the disturbance of which the action was brought, not being in existence at the time of executing the instrument under which the right was held to arise.

The house in question was one of a range of buildings, called the Royal York Crescent, at Clifton. The Crescent had been commenced in 1791, but, in consequence of the failure of the original owner, passed into various hands, and a part, comprising the houses of the plaintiff and defendant, was put up for auction in 1810. Both houses were sold: the defendant purchased No. 14; the plaintiff, in 1812, took a lease of No. 13 from the party who purchased it at the sale. By one of the conditions of sale, the

(x) *Booth v. Alcock* (1873), L. R. 8 Ch. 663. Of course, if the servitude is expressly granted for a term exceeding the original interest, the grant may have effect; *Rymier v. McLroy*, [1897] 1 Ch. 528.

(y) See the judgment of Chitty, J., in *Beddington v. Atlee* (1887), L. R. 35 Ch. D. 317.

(z) *Quicke v. Chapman*, [1903] 1 Ch. 669, per Romer, L. J., at p. 670.

(a) (1814), 1 Price, 27; 15 R. R. 652.

buildings, according to a plan of the Crescent produced at the sale, were to be completed within two years from that time, which period had elapsed previous to the granting the lease of No. 13 to the plaintiff. After the expiration of the two years the defendant erected an additional room at the back of his house, one side of the room being formed by elevating the wall which separated the gardens of Nos. 13 and 14, the effect of which was to diminish the quantity of light previously admitted through the plaintiff's windows. It appeared that, at the time of the sale, although the houses were unfinished, yet the spaces intended for the windows in question were actually opened in the walls: the plan produced at the sale showed the situation and number of the windows intended for each house. There was no stipulation as to the height to which the garden walls might be raised; but other buildings, in the same direction, were expressly limited to the height of 20 feet.

Continuous  
and apparent  
easements.

Simultaneous  
conveyances.

At the trial, before Graham, B., the learned Judge nonsuited the plaintiff, giving him leave to move to enter a verdict.

A rule having been obtained, which the Court made absolute, it was argued in support of it, that the rights of both parties were clearly pointed out at the time of the sale by the common vendor, which was admitted by Thompson, C. B., to be tantamount to an express agreement that such rights should not be obstructed. The spaces too, it was further argued, intended for the windows, being actually opened, the purchaser was fully aware what he was going to buy, as the exterior sufficiently exhibited to him what he would be entitled to enjoy.

Thompson, C. B., in delivering judgment, said: "This purchase must be taken to have been subject to certain conditions at the time of sale, and *as these unfinished houses were at that time so far built as that the openings*, which were intended to be supplied with windows, were sufficiently visible as they then stood, we must recognize an implied condition, that nothing would afterwards be done by which those windows might be obstructed; and the purchasers must have taken subject to what then appeared. The case of *Palmer v. Fletcher* (b) is strong and clear, and has been often quoted; and the effect of that case is that where a man sells a house, he shall not afterwards be permitted to disturb the rights which appertain to it; and the windows of this house, being

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(b) (1676), 1 Levinz, 122; above p. 121.

Continuous  
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easements.

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conveyances.

opened at the time, necessarily imported their non-obstruction. . . . It is sufficient for the purpose of maintaining this action, if the erection of any building on the wall be the doing of an act whereby the plaintiff has sustained a derogation of any right which he acquired by his purchase. If so, it is what the original owner could not have done; and all lessees claiming under him are equally bound by the transfer."

Wood, B., said: "I consider Dr. Compton claiming here a right by grant, and when this house was granted to Auriol (the plaintiff's lessor) he became grantee of everything necessary to its enjoyment, as much as if it had been said at the time, that no one should obstruct the light which it then enjoyed."

*Swansborough  
v. Coventry.*

In *Swansborough v. Coventry* (c), the plaintiff and defendant purchased adjoining [tenements from the same vendor and at the same auction. The lot purchased by the plaintiff contained an ancient dwelling-house, with windows in every floor, looking into the property purchased by the defendant; the windows on the first and upper floors had never been interrupted, but those on the ground floor had for a long time been obstructed by a one-story building on the defendant's lot, which was pulled down shortly before the sale. The plaintiff's tenement was conveyed to him as bounded on the east by a piece of ground, described in the particulars of sale as a piece of freehold *building ground* constituting lot 11 at the aforesaid sale, purchased by the defendant. The defendant having obstructed the plaintiff's windows, the plaintiff obtained damages as to the windows above the ground floor; and, on a rule being obtained, the Court of Common Pleas affirmed this decision.]

"It is well established by the decided cases," said Tindal, C. J., "that, where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can anyone who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. . . . And, in the present case, the sales to the plaintiff and the defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties come within the application of this general rule of law."

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(c) (1832), 9 Bing. 305; 2 M. & Scott, 362; 35 R. R. 660.

[Of course, if there had been nothing special in the case, the general rule would have operated to protect the ground floor windows also; for the defendant's land was vacant at the date of the sale. But the Court thought that the description in the plaintiff's conveyance of the adjoining property as "building ground" showed that the implied grant was intended to be in some manner qualified; and, as there had been a building on the ground in question, established for a very long period of time and but recently demolished, which extended only to the height of the first floor of the plaintiff's house, they held that this gave the limit and extent intended by the terms in the description, "so as at once to satisfy those terms, and at the same time to prevent the vendor from frustrating his own grant" (*d*).

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conveyances.

Again, in *Allen v. Taylor* (*e*), one Edward Allen, being seised of a piece of land with two dwelling-houses thereon, and also of an adjoining piece of land, devised his real estate to three trustees (including his two sons) upon trust for sale, giving his two sons an option of purchasing, either together or separately, any part of his real estate at a valuation. Both sons exercised the option, one of them taking a conveyance of the houses, with all lights, &c., the other, by a contemporaneous conveyance, taking the adjoining land. It was held by Jessel, M. R., that the purchaser of the land was not entitled to block up the windows of the houses.

*Allen v.*  
*Taylor.*

"There can be no doubt," said he, "that the law as laid down by *Palmer v. Fletcher* (*f*), is the law of the present day; that is, that, where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. . . . I take it also that it is equally settled law that, if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house (*g*). Then there comes a third case. Supposing the owner of the land and the house sells the house and land at the same moment. And supposing he expressly sells the house with the lights; can it be said that the purchaser of the land is entitled to block up the lights,—the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyance? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that

(*d*) This latter point is referred to below, p. 134.

(*e*) (1880), L. R. 16 Ch. Div. 355.

(*f*) (1675), 1 Lev. 122; above, p. 121.

(*g*) See below, p. 156.

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and apparent  
easements.

Simultaneous  
conveyances.

*Fewster v.  
Turner.*

[the vendor is at the same moment selling the house with the lights, and as part of the transaction he takes the land; he cannot take away the lights from the house." His Lordship proceeded to quote *Swansborough v. Coventry* (h), *Compton v. Richards* (i), and *Wheeldon v. Burrows* (k), and concluded by remarking upon the circumstance that, in this case, both the purchasers were also vendors (l).

In *Fewster v. Turner* (m), the question was raised before conveyance. There, property belonging to the defendant had been put up for sale in several lots, lot 1 being the Acorn Inn; and the plan circulated at the auction showed a well on lot 4, a reservoir connected with the well on lot 2, and a leaden pipe conveying water from the reservoir to the kitchen of the inn on lot 1. The plaintiff became the purchaser of the inn, and, after lot 4 had been conveyed away to another purchaser without any express reservation to the owner of lot 1 of the right of water from the well, claimed specific performance of his purchase, with compensation for the loss of the water. Wigram, V.-C., held that he had no right to compensation.

"Where the sale plan accurately represents the property, which in this case it does, can the sale plan carry the case further than a view of the property itself would? I am only, therefore, called upon to assume that which the plaintiff has clearly a right to have assumed, that the property was advertised to be sold to him as it stood at the time. The question is, then, assuming the plaintiff went to the property and viewed it, and saw the pipe, &c., would he in that case be entitled to the reservation he claims? . . . All the vendor undertook was to sell the property, but with notice that the rest of the property would no longer remain in his hands. Suppose this altogether a natural flow of water. A person then agrees to sell property, and sells it with the running water there, but makes no stipulation that he will enter into a covenant that the other purchasers shall not disturb the natural flow of the water. The plaintiff, purchasing the property with such natural flow of water, is left to assert his right against the other purchasers, if the flow of water is an easement to the

(h) (1832), 9 Bing. 305; 35 R. R. 660; above, p. 130.

(i) (1814), 1 Price, 27; 15 R. R. 682; above, p. 128.

(k) (1879), L. R. 12 Ch. Div. 31 (below, p. 164), per Thesiger, L. J., at

p. 59.

(l) Cf. Cotton, L. J., in *Russell v. Watts* (1883), L. R. 25 Ch. Div. at p. 573; and per Fry, L. J., at p. 584.

(m) (1842), 11 L. J., Ch. 161; 6 Jur. 144.

[property (n). How does the case differ if it is an artificial stream? The vendor says, 'I sell you the property as it is; other persons will hold one part, and you the other:' the plaintiff must be left to assert his right against the other purchasers. It is not for the vendor himself to take any other precaution than that of conveying to the purchaser that which he contracts to sell. I have less hesitation in coming to this conclusion because, if the effect of the contract really is to give the plaintiff the right he claims, the other purchasers who have purchased on the footing of the sale plan will have purchased with notice of the plaintiff's contract, and are as much liable to the purchaser as the vendor himself, if he had remained owner of the other lots; for, in point of fact, they all purchased upon the same footing, and with full notice of the stipulations."

Continuous  
and apparent  
easements.

Simultaneous  
conveyances.

With regard to this case, it should be noted that the Vice-Chancellor did not decide that the plaintiff was not entitled to the easement which he desired to have. On the contrary, it would seem to have been his opinion that the plaintiff was entitled to such an easement as against the vendor; and that the purchaser of lot 4, although he had obtained his conveyance without any legal reservation to the vendor or to the plaintiff, had notice of the plaintiff's rights and would be bound in equity. The plaintiff, therefore, on taking his conveyance, would have an equitable right to the easement in question, and had no claim to compensation (o).

In *Russell v. Harford* (p), the defendant had sold two prop-

*Russell v.*  
*Harford.*

(n) Or rather if the natural right to the flow of water is not restricted by an easement attached to the adjoining property: see below, Part III. Chap. I.

(o) The Vice-Chancellor did indeed express an opinion that it would be extravagant to suppose that, when the vendor sold the property, he intended

that the purchaser of lot 1 should have power to enter upon the other property and pump water for himself. But this opinion appears to be difficult to reconcile with some early cases, or with the course of the judgment in *Polden v. Bastard* (above, p. 125).

(p) (1866), L. R. 2 Eq. 507.



Continuous  
and apparent  
easements.

Simultaneous  
conveyances.

Implication  
of a grant is  
subject to  
the contract  
and surround-  
ing circum-  
stances.

[of sale, which provided that each lot was sold subject to all rights of way and water and other easements subsisting thereon.

The defendant's contention was negatived by *V.-C. Kindersley*, who was of opinion that the condition referred, not to any rights which were to subsist between the purchasers of the several lots, but to rights belonging to third persons. He might perhaps have added that the reservation was unnecessary, as, the sale being contemporaneous, the right would pass to Mackrell without express reservation.

The implication applies to devises by will as well as to contemporaneous grants by deed (*q*).

The case of *Swansborough v. Coventry*, referred to above (*r*), illustrates the further point that the implied grant may be negatived or modified either by the terms of the contract or conveyance (*s*), or by reference to the circumstances existing at the date of the grant.

The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee (*t*).

"You are also entitled to inquire into the surrounding circumstances which are relevant to such a question—the circumstances affecting the two pieces of land. In order that the circumstances may be relevant they must, in my opinion, have been known to both the parties. But if they are known to both, those circumstances must also be considered in order to see whether there is or is not an implied grant of the right to light over the adjacent land" (*u*).

In *Swansborough v. Coventry* the implication was held not to be affected (except as regards the ground-floor windows) by the fact that the land conveyed was described in the conveyance as bounded by "building land"; and *Broomfield v. Williams* (*x*) and *Pollard v. Gare* (*y*) are to the like effect.

(*q*) *Phillips v. Low*, [1892] 1 Ch. 47; and cf. *Milner's Safe Co., Ltd. v. Great Northern and City Rail. Co.*, [1907] 1 Ch. 208; and *Nicholls v. Nicholls* (1900), 81 L. T. 811 (both cases of right of way). Dist. *Taves v. Knowles*, [1891] 2 Q.B. 564.

(*r*) Page 130.

(*s*) *Salaman v. Glover* (1875), L. R. 20 Eq. 444; cf. *Haynes v. King*, [1893] 3 Ch. 439.

(*t*) *Birmingham, Dudley, and District Banking Co. v. Ross* (1888), 38 Ch. Div. 295.

(*u*) *Quicke v. Chapman*, [1903] 1 Ch. 659, per Romer, L. J., at p. 671; and see *Burrows v. Lang*, [1901] 2 Ch. 502; *Godwin v. Schuceppes, Ltd.*, [1902] 1 Ch. 926.

(*x*) [1897] 1 Ch. 602.

(*y*) [1901] 1 Ch. 834.

[But in *Murchie v. Black* (z), land was put up for sale in lots, upon condition that the purchaser of each lot should build on it according to a specified elevation. The plaintiff purchased one lot, on which stood a wall, the defendant the adjoining lot. Before the lots were conveyed, the defendant, in excavating the land bought by him in order to build according to the conditions, deprived the wall of its lateral support, and it fell; but, upon action brought, it was held that the plaintiff had no remedy. "If," said Erle, C. J., "there had been a simple conveyance to the defendant of lot 6, lot 7 would have been entitled to support as well at law as in equity, according to the series of authorities cited by Mr. James. But the question is, whether there is not in the conveyance of 1860 that which justifies what otherwise would have been an actionable wrong on the part of the defendant. If the defendant had simply dug so near the plaintiff's land as to deprive it of the lateral support it was entitled to, he would, no doubt, have been liable to an action. But here the vendor, being the owner of both lots, sells lot 6 to the defendant; and according to the terms of the contract by which it is conveyed to him, he makes it obligatory on him to do, or at all events within the provisions of that contract he was only doing his duty to his vendor when he did, the act which brought down the plaintiff's house."

Continuous  
and apparent  
easements.

Implication  
is subject to  
the contract.  
*Murchie v.*  
*Black.*

It appears that the plaintiff had added to his wall; but the case found that, even if he had not done so, the defendant's excavations would have brought it down. Some of the judges, however, founded their decision on this fact (a).

In *Rigby v. Bennett* (b) the same principle was appealed to; but the circumstances were different. In July, 1868, property was put up for sale by auction in lots, under conditions which bound each purchaser to build on the property purchased by him to the satisfaction of the vendors. None of the lots were knocked down at the auction; but the plaintiff shortly afterwards agreed to purchase one lot under the auction conditions, and proceeded to erect a building upon it. The foundation of his building was not carried to the stipulated depth; but this variation was made with the consent of the vendors. In August, 1869, the plaintiff's house having been already carried up to the joists of the first floor, the

*Rigby v.*  
*Bennett.*

(z) (1865), 19 C. B., N. S. 190.

(a) See Part V. Chap. IV., "Extinction of easement by alteration of

dominant tenement."

(b) (1882), L. R. 21 Ch. Div. 559.

Continuous  
and apparent  
easements.

Implication  
is subject to  
the contract.

[defendant agreed to buy the adjoining lot, also under the conditions prescribed at the auction. In October, 1869, the plaintiff, having almost completed his building, took a conveyance (which, under the conditions, took the form of a lease) of his lot. The defendant obtained his lease in October, 1872, but did not commence building until 1881. The defendant's operations having endangered the foundations of the plaintiff's house, the action was brought to have it determined whether the plaintiff was entitled to support, and who was liable to pay for the necessary underpinning. It was held by Bristowe, V.-C., that the defendant was liable, and his decision was affirmed on appeal. The Court declined to treat the contracts as simultaneous, the interval of thirteen months being too great to permit of it. It followed, therefore, that the general rule applied, and the plaintiff was, by virtue of his contract and lease, entitled to support. It was not expressly decided what amount of support he could claim.

It may be noted that Jessel, M. R., hinted that, if a house and land were sold together, and the land were sold for building, the general rule might not apply; and that Cotton, L. J., declined to consider "what would be the consequence if the grantee knew that the grantor intended to use the adjoining land for a particular purpose and the right claimed by the grantee was inconsistent with that purpose."

*Birmingham  
&c. Bank v.  
Ross.*

In *Birmingham, Dudley, and District Banking Co. v. Ross* (c), the point so reserved came up for decision. There, the Corporation of Birmingham had made a scheme for the improvement of an unhealthy area within the borough; and the maps accompanying the scheme showed some intended new streets. One Daniell agreed to take a lease of a piece of land comprised in the scheme, and abutting on one side on a new street to be called Warwick Passage, and to build upon the land. Daniell knew that the Corporation intended to build on the ground on the other side of Warwick Passage; and it was stipulated in the agreement that the passage should be twenty feet in width. Daniell built and took his lease of the land and the new buildings thereon, lights not being mentioned in the lease, and subsequently assigned the lease to the plaintiffs. The defendant, by agreement with the Corporation, erected on the other side of Warwick Passage a building which obstructed the plaintiffs' lights, and it was held

[that he was entitled to do so. Daniell knew that the Corporation intended to build on the other side of the passage, and bargained for and obtained special protection against obstruction by means of the stipulation as to the width of the passage; and it was held that he was entitled to no more.

Continuous and apparent easements.

Implication is subject to the contract.

In *Myers v. Catterson* (d), a railway company had sold a house with lights, and the conveyance recited that the adjoining land belonging to the company would be required for the construction of their railway. It was assumed that the company could build on such adjoining land for the purpose of such construction; but it was decided that they could not for any other purpose build so as to obstruct the lights.

*Myers v. Catterson.*

It would seem that the onus of showing the state of the tenements at the date of severance is on the party claiming the easement. For, even when an "apparent sign" of dependence and a previous unity of possession were shown, the Court declined to presume that the "apparent sign" had its origin during the unity (e).]

Onus of proof.

#### (b.) *Implied Grant of Ways.*

Where the easement is of such a nature as to have no separate and distinct existence during the unity of ownership, then, upon the severance, no grant will be implied. The doctrine of implied grant, like the destination du père de famille, confers a title only to easements which are apparent and continuous (f).

Easements must be apparent and continuous.

"It is obvious," says Pardessus, "that this disposition (état des lieux), which, from a simple destination du père de famille, thus changes itself into a servitude, must not be a momentary change for the sake of some temporary convenience; it is scarcely possible to suppose, in the absence of express agreement, that a party would have desired to preserve a right which served only for purposes purely personal, or mere pleasure. The parties are presumed to have been desirous of preserving those servitudes only which are evidently necessary" (g).

[And that the doctrine is confined to easements which are in

(d) (1889), L. R. 43 Ch. Div. 473; cf. Ch. D. 261.

*Wilson v. Queen's Club*, [1891] 3 Ch. 522.

(f) Code Civil, arts. 692, 694.

(g) *Moody v. Steggles* (1879), L. R. 12

(g) Pardessus, ubi supra.

Implied grant  
of ways.

[some sense "apparent and continuous" is evident from the judgments in all the principal authorities (*h*).

Meaning of  
"con-  
tinuous."

Taken literally, this phrase would exclude altogether from the rule of implied grants the easement of a way. A way is not in the ordinary sense a continuous easement. But, when the cases referred to are examined, it seems possible to understand the word "continuous" to refer in this connection, not to continuity of enjoyment, but to permanence in the adaptation of the tenement; and, so understood, the rule becomes both more in accordance with the principles of non-derogation and qualified necessity by which it is generally explained (*i*), and more easy to reconcile with all the authorities, including those now to be quoted.

Mr. Willes'  
opinion.

"The judgment of Bramwell, B.," wrote Mr. Willes, "in *Glave v. Harding* (*k*), explains the principle upon which it is to be determined whether the doctrine discussed in this section of the text applies to any particular case. He said, 'With regard to the right of way . . . the plaintiff's title was derived from the lease; and, unless the lease granted the right of way, it did not exist. It did not grant the right in terms; and the only way in which it could grant it was, that the condition of the premises at the time the lease was granted showed that it was intended that the right of way should be exercised, upon the principle of law that, by the devolution of two tenements originally held in one ownership, a right of way to a particular close or gate would, as an apparent and continuous easement, pass to the owner and occupier of both of them. But I think that the way in question was not a continuous and apparent easement within the principle of law; and, therefore, I arrive at the conclusion that there was no evidence of the right of way alleged in this case. I found my opinion upon the condition of the premises at the time the lease was granted, . . . there being then only excavations for foundations, with openings which were wholly of an uncertain character and would have been equally appropriate for a door, a

(*h*) *Worthington v. Gimson* (1860), 2 E. & B. 618; *James v. Plant* (1836), 4 A. & E. 749; 43 R. R. 465; *Pearson v. Spencer* (1862), 3 B. & S. 761; *Bolton v. Bolton* (1879), L. R. 11 Ch. D. 968; *Folden v. Bastard* (1865), L. R. 1 Q. B.

156; *Wheeldon v. Burrows* (1878), L. R. 12 Ch. Div. 31; cf. *Daniel v. Anderson* (1862), 31 L. J. Ch. 610.

(*i*) Above, pp. 112, 114.

(*k*) (1858), 27 L. J. Exch. 292.

[window, or any other of the purposes to which such an opening might possibly be applied' (l). Implied grant of ways.

"The reasoning of the learned Baron may seem to be inconsistent with the authorities already referred to (m), which confirm the opinions expressed by the author in the second edition of this work, that upon the severance of a tenement there is no implied grant of such easements as ordinary ways. But the inconsistency is only apparent, it being obvious that there are some cases of ways where the *necessary* and *permanent* dependence of a house upon an adjoining tenement is exhibited by some permanent sign, i.e., 'part of the structure,' for the enjoyment of which a way is necessary; as, for instance, in the case of two adjoining houses, where the coal shoot used for filling the cellar of one opens in the yard of the other; or in the case of two adjoining houses standing in a garden, the hall doors of the houses opening into the garden, and there being ways from the hall doors to the high road. If in the first case the owner conveys one house to a purchaser, or if in the latter case the owner of the houses and garden conveys one house to a purchaser, it is presumed that he could not in the first case prevent the purchaser from filling his cellar through the shoot, nor in the second from getting into the highway from his hall door through the garden, because in the first the coals might be brought through the door, or in the second because there happened to be a back entrance through a stable yard from a mews in the rear, so as to prevent a way of absolute necessity from being set up through the garden.

"Even in the case of drains, referred to in the authorities already cited, the easement is not strictly 'continuous:' the drain is not always flowing, but there is a necessary and permanent dependence of the house upon it for its enjoyment as a house, in the state in which it is at the time of the conveyance. Nor is any distinction drawn between drains arising by the act of man, and those from natural causes, as rain water.

"In the case of a landlocked house there is an *absolute* necessity for a right of way to it. In such cases as *Pyer v. Carter* (n) there

Mr. Willes' opinion.

(l) In the same case, Pollock, C. B., expressed his opinion that, "if a man builds a house, and there is actually a way used, or obviously and manifestly intended to be used, by the occupiers of the house, the mere lease of the house would carry with it the right to use the

way, as part of its construction;" but intimated that the Court was not quite agreed upon this principle.

(m) Above, p. 138, note (h).

(n) (1857), 1 H. & N. 916; below, p. 158.

Implied grant  
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opinion.

[is not an absolute necessity, for the plaintiff might have made a drain though his own land for a mere trifle.

"*Richards v. Rose* (o) was treated as a case of absolute necessity.

"*Worthington v. Gimson* (p), was a case where there were two roads to a market town from a farm, the only difference being that one was shorter than the other. A claim of a right of way into the shorter was set up, on the ground that the existence of a cart way at the time of the conveyance, indicating that the shorter way had been used before the conveyance of the farm, together with the fact of the user, were sufficient to bring the case within the rule. The distinction between such a case,—where the farm might be perfectly well enjoyed as a farm with either road, and that (which has been put) of the house where the use of a way from the front door to a highway, though not absolutely necessary (as in the case of a landlocked tenement), is necessary in order that the house may be enjoyed in the ordinary manner as a dwelling-house at all,—is obvious. But, in truth, the point was not raised, because the question of necessity was not left to the jury, doubtless for want of evidence upon it.

"*Pheysey v. Vicary* (q), was a peculiar case, which was ultimately compromised upon terms, nor was the question of necessity ever left to the jury. If it had been, the Court would have had an opportunity of dissenting from *Hinchcliffe v. Earl of Kinnoul* (r).

"There appear to be two classes of cases.

"1. Where there is no *absolute* necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependence*, in order to its enjoyment in the state it is in when sold, upon the adjoining tenement.

"2. Where there is an *absolute necessity*, as in the case of a landlocked tenement, or in such cases as *Richards v. Rose*, where the houses could not exist as houses *at all* without mutual support.

"The first class of cases are those which the author describes under the head of disposition of owner of two tenements; and it is a question of fact for a jury to say whether the easement claimed is necessary for the use of the house, or any part of it.

"It seems that there are some cases of ways which would fall within the first class, namely, ways which are *essential* to the enjoy-

(o) (1853), 9 Exch. 218.

(p) (1860), 2 E. & E. 618; below,  
p. 146.

(q) (1847), 16 M. & W. 484; 73

R. R. 583; below, p. 145.

(r) (1838), 5 Bing. N. C. 1; 50 R. R.

579; below, p. 143.

[ment and use of those things which are the subject of the grant, as in the case put of the coal shoot and hall door. The judgment of the Court of Common Pleas in *Hinchcliffe v. Earl of Kinnoul* (s) is conclusive upon this point. It is obvious that a hall door is as necessary to the convenient enjoyment of a dwelling-house for entrance by the hall, as a coal shoot for putting coals into the cellar, and that neither are the less so because persons may get into the house through a stable and kitchen, or may bring their coals in through the doors or windows; and as, in *Hinchcliffe v. Earl of Kinnoul*, the Court was of opinion that a right of way to the coal shoot would be implied, the jury having found that a right of way to it was necessary, so it should seem that it would also have held that it would be implied to the hall door in the case suggested above.

Implied grant  
of ways.  
Mr. Willes'  
opinion.

"The judgment in *Hinchcliffe v. Earl of Kinnoul* establishes, that, upon the conveyance of a house 'consisting of certain parts,' easements necessary to the use of those parts, as they actually stood at the time of the conveyance, pass by implied grant without reference to the question of absolute necessity, in the sense that the person to whom the house is conveyed might possibly be able so to alter the construction of the house as to be able to dispense with those easements; and, as it has been already pointed out, the same question was never really raised either in *Pheysey v. Vicary*, or *Worthington v. Gimson*."

The above observations were to some extent new when they were advanced in a former edition of this work; and, although their importance is somewhat lessened by the new statutory importation into every conveyance of a grant of ways "occupied or enjoyed" with the tenement granted (t), it is still worth while to collect all the cases bearing upon the point, and to consider how far the observations in question are supported by authority.]

The cases to  
be considered.

In 11 H. 4, 5, pl. 12, Hankford, J. demanded of Huls: "If a man has a way appendant to his frank tenement to go over the land of another, if he purchases the land in which he has the way, and afterwards the same land in which he had the way passes into strange hands, if he shall still have the way or not?" Huls says: "He shall have it and use it, for that a way is more necessary to a man than any other appendant; but, if it had been common appendant, it would have been extinct in perpetuum." Hankford, J. :

Year-book.

(s) See note (r) previous page.

(t) Above, p. 83.



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of ways.

"In this regard I don't see any diversity, for without having pasture for any beasts my land cannot be (gayne); so one is as necessary as the other." Culpepper: "The unity of possession in the one case, as well as the other, extinguishes everything." Hankford, J.: "A man cannot have appendancy in his own soil; and when he purchases the land in which he has the way, the way is no longer appendant, for he may make what ways he pleases in his own soil, though he had not any there before, by reason of the property which he has in the soil, by which the appendancy is extinct; and if the appendancy be extinct, and the appendancy is the reason of the title, *ergo* the way is gone for ever."

*Morris v.  
Edgington.*

[In *Morris v. Edgington* (*u*), the tenant of a public-house sued his landlord for obstructing a way demised by the lease. The greater part of the premises demised lay on the west side of a gateway; but they also comprised a tap-room to the east of the same gateway. When the gate was shut, the tap-room might be approached by entering the coffee-room in the western part of the premises, and passing out and across the gateway to the eastern side. But the obvious and usual approach to the tap-room from the street was through the open gateway, upon entering which the door of the tap-room was seen on the eastern side of it, with a finger-board pointing and directing, "To the tap-room." The lease to the plaintiff, which included the tap-room, gave the lessee a right of way through the lessor's yard lying beyond the gateway to some cellars lying at the back, but no express right of way to the tap-room; and the gateway and yard were expressly reserved to the lessor.

The lessor having shut the gates at nightfall for the protection of the cows in the yard, and thus deprived the lessee of some of his custom, this action was brought. The plaintiff obtained a verdict, and the Court of Common Pleas refused to set it aside.

"I say nothing," said Mansfield, C. J., "of what is a way of necessity; I know not how it has been expounded. But it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had. Then what are the circumstances of this case? First, it is much more convenient for anyone to go to the tap-room through the gateway than through the coffee-room. And it is much more convenient to carry out beer through the gateway than

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(*u*) (1810), 3 Taunt. 24; 12 R. R. 579.

[through the coffee-room. Can it then be doubted than the intent was to give the same use of the way over the gateway as the lessor before used to have? . . . . The argument founded on the expression of the special right of way goes too far; for, if it deprives the plaintiff of this way, it deprives him of all ways to the tap-room." The argument founded on the reservation of the gateway was disposed of by Lawrence, J., on the same ground.

Implied grant  
of ways.

*Morris v.  
Edgington.*

This case is not conclusive on the point, as it is sufficiently supported by the principle that, some way being necessary, the most usual and convenient should be taken. But the dictum of Sir J. Mansfield is of great importance.

In *Hinchcliffe v. Earl of Kinnoul* (v) it appeared that in the year 1819 Earl Grosvenor, who was entitled, in reversion expectant on a ground lease expiring in 1824, to a messuage and an adjoining passage, demised the messuage to the plaintiff (who was then in possession as under-lessee) for a term to commence on the expiration of the ground lease. Shortly afterwards, namely, in 1822, Earl Grosvenor demised the passage to Viscount Hampden (who was also in possession under the ground lease) for a term to commence on or about the expiration of the ground lease. It appeared that, at the time of the execution of the lease of 1819, the plaintiff's messuage included a coal shoot or coal hole opening into the passage, a water-pipe under the passage, and two other pipes running down the wall of the house over the passage—all which, according to the finding of the jury, were necessary for the convenient and beneficial use and occupation of the messuage. The occupiers of the messuage had long used the passage for filling their coal cellar; and the jury expressly stated that the coal shoot could not be used, and the needful repairs to the pipes could not be done, without passing and repassing over the passage. The plaintiff's lease described the messuage as abutting on the passage (x), and contained a covenant by the lessee to repair the messuage and cleanse the pipes.

*Hinchcliffe v.  
Earl of  
Kinnoul.*

Upon these facts, the Court of Common Pleas held that the plaintiff was entitled, by the legal operation of the lease, to a right of way over the passage for the purpose of using the coal shoot and cleansing and repairing the pipes. "We are of opinion," said Tindal, C. J., "that, upon the facts found in the special verdict, such right (the right of way) did pass as a neces-

(v) (1838), 6 Bing. N. C. 1; 50 R. R. 579.

(x) This fact was not adverted to in the judgment; but see above, p. 112.

Implied grant  
of ways.

*Hinchcliffe v.  
Earl of  
Kinnoul.*

[sary incident to the subject-matter actually demised, although not specially named in the lease. The rule laid down in Plowden's Comm. 16 a., is 'that by the grant of anything conceditur et id sine qua res ipsa haberi non potest; as, if one grant his trees, the grantee may enter upon his land for the cutting down and carrying them away,' for which the authority of the Year-book, 2 Rich. 2, is cited. And again, Twisden, J., in *Pomfret v. Ricroft* (y), lays down the rule of law to be 'where the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. So, if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me.' Now, in the present case, the jury have found expressly by their verdict that the passing and repassing over the way or passage is not merely convenient but necessary 'for the use of the coal shoot and of the pipes, and for the repairing and amending the same and the side or wall of the house;' to the performance of which, it is also to be observed, the lessees are expressly bound by the covenant entered into by them with the lessor by the same lease.

"Since, therefore, as it appears to us, the right in question passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject-matter of demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or not pass to the lessees under the express words used in the lease itself, as an 'appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises, belonging or appertaining'?" There are strong authorities in the law books to show these words capable of a wider interpretation, and of carrying more than is 'an appurtenant' in the strict sense of that word, where such interpretation is necessary in order to give that word some operation; such are the cases in Moore's Rep. 682 (z), *Archer v. Bennett* (a), *Hill v. Grange* (b),

(y) (1669), 1 Saund. 322. On this principle see further below, Part IV. Chap. II.

(z) The case referred to is *Brown v. Nichols*, and is reported as follows:—"Un conduit pur le porter de ewe al un meason voit passer ove le meason per le parol appurtenant, et l'ownor foit vener en aut. soile a ceo mender, mes il doit

ceo faire en convenient temps; et ceo sans special prescription ou special grant.—Per Curiam." This seems to be like *Nicholas v. Chamberlain* (above, p. 118), and no authority for the case of a way.

(a) (1676), 1 Lev. 131; Sid. 211. This is a case of parcels.

(b) Plowd. Comm. 170. The passage

[“and others. But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion upon this second point (c).”

Implied grant  
of ways.  
*Hinchcliffe v.  
Earl of  
Kinnoul.*

“Upon the whole, it appears . . . that, if the words of the lease will admit of such construction (*i.e.*, of being construed as conferring the right claimed), it was the apparent intention of the parties to that instrument, arising from the state and circumstances of the property and the language of the instrument itself, that they should be so construed.”

In the case of *Pheysey v. Vicary* (*d*), there were two houses, contiguous to the highway, of which there had been unity of ownership. By will, the owner of both devised one to the plaintiff and one to the defendant, each with “the appurtenances thereunto belonging.” During the unity, and at the time of the severance, there was a hard carriage-drive used in common, and continued in front of the defendant’s house to the plaintiff’s front door. The plaintiff had another entrance at the back of his house. It was contended for the plaintiff that, on the severance, a right existed to continue to have the way which had been used during the joint ownership; for it was an easement of a permanent nature, “stamped upon the land,” and as apparent as a right of watercourse. The case was ultimately compromised, the judges intimating that they might order a new trial, to try whether the way claimed was necessary to the convenient occupation of the plaintiff’s house. In the course of the argument, Parke, B., asked: “Is the way contended for by the plaintiff to be construed as of absolute necessity for access to property in its strict sense, as in the older cases, or as necessary to the convenient enjoyment of his dwelling-house with reference to its condition at the time the testator had the lease of it, as put in *Morris v. Edgington* (*e*) by Sir James Mansfield, who says ‘it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had’? One or other of the ways then in question was essential to the use of the house, and the Court ruled that

*Pheysey v.  
Vicary.*

referred to appears to be a discussion of the question whether land can be properly described as appurtenant to land.

(c) The cases cited certainly do not seem to support the argument referred to, which could not, it is conceived, be

successfully advanced at the present day; above, p. 87.

(d) (1847), 16 M. & W. 484; 73 R. R. 583.

(e) (1810), 3 Taunt. 31; 12 R. R. 579; above, p. 142.

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of ways.

*Pheasey v.  
Vicary.*

[the most convenient of these was that way of necessity to which the party was entitled. That decision is confirmed in *Barlow v. Rhodes* (*f*), which shows that the way asserted in *Morris v. Edgington* might be so asserted as a way of necessity." Alderson, B.: "Had this been not a dwelling-house, but a field used for tillage, the way which would pass must be such as would enable the owner to use the field in every possible way, *e.g.*, to get wagons, &c., in. Then, in this case of a dwelling-house, must not the way be such as would enable him to get conveniently to every part of it?"

*James v.  
Plant.*

The decision in *James v. Plant* (*g*) turned upon a grant of ways "usually held, used, occupied, or enjoyed," with the quasi-dominant tenement. The case was decided upon demurrer; and it does not appear whether there was any "visible sign" of the existence of the way.

*Worthington  
v. Gimson.*

In *Worthington v. Gimson* (*h*), two farms had belonged to two persons as joint owners, and the occupier of one of them had long used a way over the other. It does not appear whether there was a hard or visible track; but the way had been regularly used for many years. It was held that, upon a partition under which the farms were conveyed to separate owners in severalty, there was no implied grant of the right to use the way. Crompton, J., after quoting with approbation the author's distinction between continuous and apparent easements on the one side and ways on the other (*i*), continued: "It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, *from the nature of a road*, whether the parties intended the right of using it to pass."

*Pearson v.  
Spencer.*

In *Pearson v. Spencer* (*k*), the plaintiff and the defendant claimed under the same devisor. The only way to the defendant's land was through the plaintiff's. The devise to the defendant made no mention of ways; but there was a road through the plaintiff's land which the devisor had used, and which for some distance skirted the hedge of the defendant's land until it came

(*f*) (1833), 3 Tyr. 280; 38 R. R. 653.

Q. B. 116.

(*g*) (1836), 4 A. & E. 749; 43 R. R. 465.

(*i*) Above, p. 115.

(*h*) (1860), 2 E. & E. 618; 29 L. J.,

(*k*) (1862), 1 B. & S. 671; affirmed in error, 3 B. & S. 761.

[to a gate; and the question was, whether the defendant had a right of way along the road used by the devisor, or only up to the point where it joined his hedge. The Exchequer Chamber say, "We sustain the judgment of the Court below on the construction and effect of James Pearson's will, taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property. He intended to create two distinct farms, with two distinct dwelling-houses, and leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of way to it, and we think the way in question passed with that devise. It falls under the class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependence*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenements. These are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependence on the plaintiff's land of a right of way over it in the customary manner."

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Pearson v.  
Spencer.

In *Langley v. Hammond* (l), the defendant, having taken a surrender of part of a farmyard adjoining her premises, with the appurtenances "used and enjoyed" with the part surrendered, claimed the right to use a road running through the remainder of the surrenderor's property. The way was to some extent defined, but does not appear to have been hard and gravelled. The defendant's contention was negatived, two of the judges deciding the case on the authority of *Thomson v. Waterlow* (m). But Bramwell, B., gave judgment as follows:—

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Hammond.

"I also think this rule must be discharged. I am not prepared to say, and I do not understand the Master of the Rolls to have decided, that a right of way could not pass under words such as those here used, even though there had always previously been unity of ownership and of possession. And should the case arise, I should wish for time to consider before I assented to the doctrine supposed to have been laid down. Suppose a house to stand 100 yards from a highway, and to be approached by a road

(l) (1868), L. R. 3 Exch. 161.

(m) See above, p. 92.

Implied grant  
of ways.

*Langley v.  
Hammond.*

[running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use the road, not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is, that there is here really no defined road. It is said that it is hard and gravelled, but in truth as soon as you turn out of West Street, you do not come into what is a road and nothing else, kept for no other purpose, but into a rick-yard, where the occupier could, and no doubt did, go in any particular direction he desired. But this is not a way of such a definite kind as will pass under general words; it is no more a way (if I may use the illustration) than the short cut a man may take across his room from the piano to the fireplace is a way. In one sense, no doubt, it is a way which he may use, but he only uses it equally with ways in other directions, by virtue of his rights of possession, not because there is any road made there, but because it is the shortest cut to the place he wishes to get to.]

*Watts v.  
Kelson.*

In *Watts v. Kelson* (n), Lord Justice Mellish, in the course of the argument, made the following observation: "When a man walks over his own land in a particular direction, he is not using anything; he is merely going where he pleases on his own property. But where there is a structure erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that, if a man construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field." And in giving the judgment of the Court, he says: "We may also observe that, in *Langley v. Hammond* (o), Baron Bramwell expressed an opinion, in which we concur, that, even in the case of a right of way, if there was a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words" (p).

(n) (1870), L. R. 6 Ch. at pp. 172, 174. The decision did not depend on this point (see above, p. 125).

(o) (1868), L. R. 3 Exch. 161.

(p) Cf. *Kay v. Oxley* (1875), L. R. 10

Q. B. 360. Fry, J., quoted and adopted these dicta in *Barkshire v. Grubb* (1881), L. R. 18 Ch. D. 616; but that case also was not decided on this ground (see above, p. 99).

[In both of these cases, the conveyance which was the subject of adjudication included ways "used and enjoyed" with the alleged dominant tenement; and they are, therefore, no express authority upon the effect of a conveyance without those words. Implied grant of ways.

The case of *Davies v. Sear* (g) was an authority in favour of the implied reservation of a way, the "apparent sign" in this case being an archway upon the quasi-dominant tenement. But this case, so far as it rests on the doctrine of implied reservation pure and simple, must now be deemed to be overruled by *Wheeldon v. Burrows* (r). *Davies v. Sear.*

In *Brett v. Clowser* (\*) the plaintiff sued the defendant Clowser, among other things, for the obstruction of a right of way claimed by the plaintiff over Clowser's premises. It appeared that Clowser, who had occupied his premises since 1867 under an agreement for a lease entered into by the common owner of the plaintiff's and defendant's premises, had made an arrangement with a former tenant of the plaintiff's premises, which was expressly limited to the duration of such tenant's interest, under which a door had been opened from part of the plaintiff's premises into Clowser's premises, and a way, leading from this door to the high road, had been used by the tenant in question and his customers. In June, 1878, the tenant's interest expired. In September, 1878, the premises occupied by him were re-let to the plaintiff, with all ways, &c., belonging or appertaining thereto. In October, 1878, Clowser took a legal demise of his premises under his old agreement. The plaintiff claimed a right of way through the doorway into the high road. *Brett v. Clowser.*

Denman, J., in giving judgment for the defendant, said that the question must turn upon whether the lease of September contained any such words as to create anew the right of way claimed. "It was contended for the plaintiff that it did, because the way was an obvious one, passing through a made doorway and over a defined path, and being in actual use at the time at which the lease of the 23rd of September, 1878, was made; and a dictum of Bramwell, B., in the case of *Langley v. Hammond* (t) was strongly relied on. That, however, was a case in which the words of the deed in question were these, 'together with all ways therewith' (i.e., with the premises) 'now used, occupied, and enjoyed,'—words which render

(g) (1869), L. R. 7 Eq. 427.  
(r) (1879), L. R. 12 Ch. Div. 31;  
below, p. 164.

(s) (1880), L. R. 5 C. P. D. 376.  
(t) (1868), L. R. 3 Exch. at p. 171  
above, p. 147.



Implied grant  
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*Brett v.  
Clowser.*

[the dictum wholly inapplicable to the present case. The words of the lease to the plaintiff relied upon as conveying the right of way in question were the words 'ways, paths, passages, easements, commodities, advantages, and appurtenances to the said premises, belonging or in anywise appertaining.' It was contended that the way in question passed under these general words, and the judgment of Lord Justice Mellish in *Watts v. Kelson* (u) was cited in support of that contention. . . . *Kay v. Oxley* (x) was also relied upon, in which Lush, J., speaks approvingly of the view taken by Bramwell, B., in *Langley v. Hammond*. But, in all these cases, the 'general words,' found in the conveyance, which were relied upon, were words descriptive of the easements in question, as 'with the premises now occupied or enjoyed;' and [they] are therefore no authorities for the plaintiff in the present case, which falls within the doctrine laid down in *Worthington v. Gimson* (y), *Pearson v. Spencer* (z), and *Wheeldon v. Burrows* (a), that, except in the case of a way of necessity, in the absence of any reservation, no right to use ways which have been used and enjoyed in fact passes to a grantee of the land, unless there be something in the conveyance to show an intention to create the right to use the way de novo."

Observations  
on *Brett v.  
Clowser.*

The decision in *Brett v. Clowser*, so far as it rests on the opinion above quoted, appears to be directly contrary to the dicta of Bramwell, B., Mellish, L. J., and Lush, J., above quoted, and in fact to decide the point under discussion. But it may be observed that Mr. Justice Denman does not seem to have had before him the cases of *Hinchcliffe v. Earl of Kinnoul* and *Pheysey v. Vicary*, above quoted; and that the actual decision in *Brett v. Clowser* is sufficiently supported by the consideration that at the date of the plaintiff's lease the adjoining premises were, by virtue of the agreement of 1867, equitably vested in Clowser (b).

*Bayley v.  
Great Western  
Rail. Co.*

The decision in *Bayley v. Great Western Rail. Co.* (c) turned on the words of the conveyance; but Chitty, J., in the course of his judgment made some observations which bear directly on the point under discussion. "Before I go to the authorities," he

(u) (1870), L. R. 6 Ch. App. at p. 174.

(x) (1875), L. R. 10 Q. B. 360.

(y) (1860), 2 E. & E. 618; 39 L. J., Q. B. 116.

(z) (1862), 1 B. & S. 571; 3 B. & S. 761.

(a) (1879), L. R. 12 Ch. Div. 31.

(b) See *Beddington v. Atlee*, quoted above, p. 128, n.

(c) (1884), L. R. 26 Ch. D. 434; cf. per Bowen, L. J., at p. 453, and *Ford v. Metropolitan and District Railways* (1886), L. R. 17 Q. B. Div. 12.

[says, "I will mention the following point. During the argument I put this case to the plaintiff's counsel. Assume that a house abuts on a private road belonging to the owner of the house, with its front door opening on to the private road, and that there is an ordinary back way to the house, so that, as a matter of fact, you could get into the house, not by the front door in the ordinary way, but by the back door. If, in those circumstances, the owner of the house and of the private road in front were to grant the house, and the deed were entirely silent as to the private road running in front, would the grantee of the house have a right of way? The plaintiff's counsel said 'No;' and, as far as I am aware, there is no express decision on the point. But, if that point should ever come for decision, it seems to me it will be worthy of consideration, whether the same principle which applies to the grant of a house with reference to light should not apply to the grant of the house with reference to a way of this kind. I am assuming that in such a case there is a front door, and that the private road is the usual mode of access to the house as a house, a man not being in the habit of approaching his own house by the back door. I quite admit that in point of law there is a difference between the easement of light, which is always permeating the open spaces which form the windows of a house,—for in that sense, no doubt, the easement of light is continuous; whereas, as regards a right of way, that is a discontinuous easement, because a man is not always walking in and out of his front door. But at the same time the reason why the easement of light passes as against the grantor is because the grantor has granted the house in the state in which it is. It seems to me there is strong ground for holding, if the point should come up for consideration, that, in the case I have put of the right of way, there is in like manner a grant of the house to be used as the house stands, and that the ordinary mode of access to the front door is one that ought to pass. But that is not the case I have now to consider."

Implied grant  
of ways.

*Bayley v.  
Great Western  
Rail. Co.*

In *Ford v. Metropolitan Railway Companies (d)* the point arose, but not directly between grantor and grantee. The plaintiffs were lessees of rooms situate in the back block of a house, the usual (but not the only) mode of access being through a passage and hall forming part of the front block. A railway company

*Ford v.  
Metropolitan  
Railways.*

Implied grant  
of ways.

*Ford v.  
Metropolitan  
Railways.*

[having, under their compulsory powers, taken down the front block and removed the hall, it was held that the plaintiffs were entitled to compensation for loss of their easement. "It was said," said Bowen, L. J., "that this mode of access was a way of necessity. That appears to me to be an imperfect statement of its character. A right of way of necessity is a right which arises by implication; but its true nature, and the distinctions which obtain between the present right of access claimed and a right of way of necessity is explained in *Pearson v. Spencer (e)*. The present right, using the language of Lord Chief Justice Erle, falls under that class of implied grants 'where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement.' It was therefore a private right which the occupiers of these rooms were by law entitled to make use of in connection with their property."

*Brown v.  
Alabaster.*

At last, in *Brown v. Alabaster (f)*, the question came up directly for decision. There, a lessee of two plots of land, A. and B., had built upon B. two houses with gardens, the houses fronting to one road and the gardens communicating with another by garden-gates and a back-way formed over plot A. The back-way, though not the only access to the houses on plot B., was the only convenient way by which manure, &c., could be taken into the gardens, and was admitted to be essential to the comfortable enjoyment of the houses. The houses on plot B., with their "rights, easements, and appurtenances," were conveyed to the defendant, and subsequently plot A. to the plaintiff. It was held that the defendant was entitled by implication to a right of way over the back-road. Mr. Justice Kay, after referring to many of the above cases, proceeded: "It seems to me that the law is this—that a particular formed way to an entrance to premises like these, 'Westbourne' and 'Cottisbrook,' which leads to gates in a wall part of these demised premises, and without which those gates would be perfectly useless, may pass although in some sense it is not an apparent and continuous easement; or rather may pass—because, being a formed road, it is considered by the

(e) Above, p. 146.

(f) (1887), L. R. 37 Ch. D. 490. Cf. *Thomas v. Owen* (1887), L. R. 20 Q. B. Div. 225, cited below, p. 169; and dist.

*Taus v. Knowles*, [1891] 2 Q. B. 564, where the quasi-servient property was in mortgage at the date of severance.

[authorities, in cases like this, to be a continuous and apparent easement—by implied grant without any large general words, or indeed without any general words at all. Here I have a case in which these two gardens, although they are not absolutely inaccessible, are inaccessible except through a part of the house, unless they are to be reached by the gates at the bottom of the gardens communicating with this formed back-way. That it was intended, looking at all the facts, that the persons to whom ‘Westbourne’ and ‘Cottisbrook’ were conveyed should have the use of those two gates and of this back-way, is, to my mind, beyond all doubt. Then, although I agree that it is not for all purposes a way of necessity, do I want any express grant? It seems to me to be clear on the authorities that an express grant is not wanted in such a case as this. Therefore I hold that the right to use this back-way in the same mode as it was usable by the occupiers of ‘Cottisbrook’ and ‘Westbourne’ at the time of the grant of these properties did pass by implied grant, and accordingly this case must be decided on that footing.”

Implied grant  
of ways.

*Brown v.  
Alabaster.*

In *Nicholls v. Nicholls* (g) the point was again directly decided, although the learned judge appears to some extent to have based his decision upon general words which he was of opinion ought to be implied. In that case three persons, of whom the plaintiff and defendant were two, were entitled to the residuary real estate of a testator in equal shares. Two adjoining houses, called “Bedeburn” and “Stanley Villa,” formed part of the testator’s residuary real estate, and by an agreement entered into by the three beneficiaries for the purpose of dividing the residuary estate, it was agreed (inter alia) that “Bedeburn” should be taken by and forthwith conveyed to the plaintiff, and “Stanley Villa” should be taken by and forthwith conveyed to the defendant.

*Nicholls v.  
Nicholls.*

These two houses fronted upon a road called Park Road, each having a front entrance from that road. Along one side of “Stanley Villa,” commencing from Park Road, ran a private side road made up with gravel between walls and fences; this road was continued until it met another road at right angles, which was also made up with gravel between fences, and ran at the back of the two houses, affording a back entrance to each of them. The plaintiff claimed the right to the use of this side and back road, and

Implied grant  
of ways.

*Nicholls v.  
Nicholls.*

[Stirling, J., held that she was entitled to such use on the ground that the agreement being executory was to be followed by conveyances which ought to be treated as if they were contemporaneous, and that in these conveyances the descriptions should be followed by such general words as, previously to the Conveyancing Act, 1881, could have been insisted on by a purchaser as a matter of right, and these words he took for the purpose of his judgment to be "together with the ways, rights and appurtenances thereunto belonging."

The following passage appears in the judgment: "Although in general a way, not being a way of necessity, does not fall within this rule, still it is established, by many cases, that a formed road over one tenement to and for the apparent use of the other does"; and the learned judge referred to *Pearson v. Spencer* (h) and *Brown v. Alabaster* (i).

*Brazier v.  
Glasspool.*

In *Brazier v. Glasspool* (k), where the plaintiff claimed a right of way over a tramway owned by the defendant, in respect of a piece of land granted to him by the defendant, Byrne, J., although deciding the point in the plaintiff's favour under the Conveyancing Act, 1881 (l), expressed his opinion that there was an implied grant of the right of way, which, though not a way of necessity, was a way constructed in accordance with a prior agreement between the plaintiff and the defendant, and was an apparent and formed tramway at the date of the conveyance, enjoyed in such a manner as to lead to a reasonable expectation that the enjoyment would be permitted to continue.

*Milner's Safe  
Co., Ltd. v.  
Great Northern  
and City  
Rail. Co.*

In *Milner's Safe Co., Ltd. v. Great Northern and City Rail. Co.* (m), the question arose again, and was treated by the learned judge as being hardly open to question, at any rate in the case of grants *inter vivos*.

In that case a testator built a row of houses, fronting on to a public street, and having a narrow passage at the back with which they all communicated. The plaintiffs were owners in fee of two of these houses, and the defendants of two others, both deriving their title from the testator, who had made no express grant of any rights of way over the passage, in dealing with the property by his will. The defendants pulled down their houses, and built

(h) Cited above, p. 146.

(i) Cited above, p. 152.

(k) [1901] W. N. 237; cited above,  
p. 106.

(l) 44 & 45 Vict. c. 41, s. 6.

(m) [1907] 1 Ch. 208 (compromised on  
appeal).

[on their site an underground railway station, whence their passengers made use of the passage. The plaintiffs brought an action against the defendants to restrain this user.

Implied grant  
of ways.

*Milner's Safe  
Co., Ltd. v.  
Great Northern  
and City  
Rail. Co.*

Kekewich, J., after stating the facts, continued as follows: "The first question is whether the several devisees had rights of way over the passage. None are expressly given, but it is said that rights must be implied from the surrounding circumstances, and I entertain no doubt that this contention is sound. If this were a case of grant instead of devise, rights of way would necessarily be implied, and there is ample authority for the proposition that the settled law as regards implied grants is applicable to devises, where the circumstances demand its application." The learned judge referred to *Phillips v. Low* (n), and to *Pearson v. Spencer*, quoting from the passage in the judgment delivered by Erle, C. J., in the latter case, which is quoted above (o), and continued: "Bearing in mind that the passage with which we are dealing has been constructed for the convenience of these houses, there seems to be here that 'necessary dependence' of which the Chief Justice speaks," (in *Pearson v. Spencer*) "and that is not at all affected by the fact that these houses had entrances to Finsbury Pavement."

The decision was that there was an implied grant both to the plaintiffs and defendants, but that the grant was limited to business and domestic purposes only, and that the user by the defendants was excessive, and unauthorised by the implied grant.

In an Irish case, *Macnaghten v. Baird* (p), the easement claimed was the right to use water from a well situate on the premises of the plaintiff, by whom these premises and the premises in respect of which the easement was claimed had, prior to 1875, been held. In 1875 the latter premises were let by the plaintiff to a tenant through whom the defendant claimed.

*Macnaghten  
v. Baird.*

The question came before the Irish Court of Appeal, who decided against the easement claimed, on the ground, so far as concerns the question now under consideration, that the defendant's premises, on which a dwelling-house then stood, had upon them, at the date of the letting of 1875, only a barn, for the purposes of which the

(n) [1892] 1 Ch. 47. (o) Page 147.  
(p) [1903] 2 Ir. R. 731.

Implied grant  
of ways. [right claimed was unnecessary, and it was therefore not an existing  
right at the date of the severance.

Result of the  
discussion. To sum up, it is clear that a way merely used with the quasi-  
dominant tenement over other land of the same owner, and  
not evidenced by any apparent sign, will not, independently of  
the Conveyancing Act, 1881 (g), pass upon a conveyance of the  
quasi-dominant tenement without special words.

Further, it cannot be said to be completely settled that such a  
way will pass if the only "apparent sign" be the state of the road  
on the quasi-servient tenement itself. A hard and gravelled road  
is indeed "apparent;" but it is in this case a part, not of the  
tenement conveyed, but of the tenement retained, and it cannot be  
said that such a way, by reason merely of its "apparent" nature,  
is necessary to the use of any part of the tenement conveyed.  
It is, however, submitted that a formed road or way over one  
tenement, for the apparent use of the other, such road or way  
being necessary for the reasonable and convenient occupation  
and enjoyment of the quasi-dominant tenement, will pass, by  
implied grant, upon a severance of the tenements.

And where the "apparent sign" of user is a part, not of the  
tenement retained, but of the tenement conveyed,—such as a  
substantial and permanent doorway, or a formed road extending  
over both tenements,—there is ample authority for saying that the  
doctrine of implied grant applies.

Extinguish-  
ment. It has already been pointed out by the learned author that there  
is no distinction between the different kinds of easements as to  
their being extinguished by unity of ownership. The distinction  
is, that upon a severance of the tenements those easements arising  
from "the disposition of the owner of two tenements," and ease-  
ments of necessity, are created *de novo* by implied grant, while  
other easements require express words of grant to create them.

#### (c.) *Implied Reservation.*

The author's  
opinion. It was the opinion of the author of this treatise that, upon a  
severance of two tenements connected by some apparent sign of  
servitude, whether by the grant of the quasi-dominant or of the  
quasi-servient tenement, an easement was by implication created

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(g) Above, p. 83.

[in favour of the quasi-dominant property. Looking upon the quasi-easement as a quality added to the dominant close by the owner of both tenements, he held that this quality remained impressed upon it for the benefit of either grantee or grantor. And, in his view, the doctrine that both parties are equally bound to respect the disposition of the property, derived additional weight from its coincidence with the analogous case of easements commonly called of necessity, which, it is quite clear, are equally implied in favour of both parties. He saw no reason why a purchaser should not exercise caution in ascertaining what easements his projected purchase is liable to in favour of his vendor, as well as in favour of other adjoining owners.

The author's  
opinion.

This opinion, which was shared by Mr. Willes, must now be considered to be overruled, the Courts considering that the operation of the doctrine in question, on a sale of the quasi-servient tenement, is prevented by the principle that "a man cannot derogate from his own grant." But in view of the importance of the controversy, it is worth while to consider the authorities on both sides.

No implied  
reservation.

In *Nicholas v. Chamberlain*, quoted above (*r*), the judgment of the Court makes no distinction between the case where the quasi-dominant tenement, the house, is sold first, and the case where it is retained.]

*Nicholas v.*  
*Chamberlain.*

In *Riviere v. Bower* (*s*), the plaintiff was proprietor of a house which he had divided into two tenements, one of which he demised to the defendant, retaining the other in his own occupation; the defendant obstructed a window which the plaintiff had made in his own house shortly before the demise to the defendant. On the part of the defendant, it was objected that the action did not lie unless the window was ancient. Lord Tenterden held "that the action was maintainable against a person holding as tenant, for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and that although there was no stipulation at the time of the demise against the obstruction."

*Riviere v.*  
*Bower.*

In *Palmer v. Fletcher* (*t*), Kelynge, J., said, suppose the land had been sold first and the house after, the vendee of the land might stop the lights. Twysden, J., on the contrary, said, whether

*Palmer v.*  
*Fletcher.*

(*r*) Page 118.

(*s*) (1824), Ry. & Moo. 24; 27 R. R. 726.

(*t*) (1675), 1 Lev. 122; above, p. 121.



No implied reservation. the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees, and cited a case to be so adjudged.

*Tenant v. Goldwin.*

In *Tenant v. Goldwin* (*u*), Lord Holt, as reported by Lord Raymond, said: "As to the case of *Palmer and Fletcher*, if, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and, as he cannot do so, so neither can his vendee. But, if he had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, the vendee might build against his house. But, in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." The report of the same case by Salkeld, who was himself counsel in the cause, is silent as to any such dictum; and, from the report in 6 Mod. 314, it would seem that the Court only expressed a doubt upon the point. "If he had sold the vacant ground without reserving the benefit of the lights, the Court doubted in that case that the vendee might build so as to stop the lights of the vendor, because he had parted with the ground without reserving the benefit of the lights; for that case differs from that of *Palmer v. Fletcher*."

*Pyer v. Carter.*

[In *Pyer v. Carter* (*x*) the defendant's house adjoined the plaintiff's, and the action was for stopping a drain running under both houses. The two houses had formerly been one, and were converted into two by a former owner, who conveyed one to the defendant and afterwards the other to the plaintiff. At the time of the conveyances the drain existed, running under the plaintiff's house and then under the defendant's, and discharging itself into the common sewer; water from the eaves of the defendant's house fell on the plaintiff's, and then ran into the drain on the plaintiff's premises and thence through the defendant's premises into the common sewer. The plaintiff's house was drained through the same drain. It was proved that the plaintiff might have made a drain direct from his house into the common sewer, and it was not proved that the defendant when he purchased knew of the position of the drain.

It was laid down by the Court that, where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser

(*u*) (1705), 2 Lord Raym. 1093; S. C., 1 Salk. 360; 6 Mod. 314.  
(*x*) (1857), 1 H. & N. 916.

[will be entitled to the benefit of all drains from that house, and subject to all the drains then "necessarily used" for the enjoyment of the adjoining house, and that without any express reservation or grant, inasmuch as the purchaser takes the house "as it is;" and that the question as to what is "necessarily used" depends upon the state of things at the time of the conveyance, and as matters then stood without alteration. And, upon the argument urged that this was not an "apparent" and continuous easement, the Court said that, although the defendant did not know of the existence of the drain at the time of the conveyance to him, yet as he must or ought to have known that there was some drainage for the waters, he ought to have inquired, and the Court "agreed with" the author's observation, that those things are apparent which would be so upon a careful inspection by a person conversant with such matters.]

No implied reservation.

*Pyer v. Carter.*

In the case above cited the defendant purchased before the plaintiff, and it appears from the judgment of the Court that the priority of the conveyances in order of time was considered immaterial (y).]

In *Richards v. Rose* (z), which was an action for removing the support to the plaintiff's house, it appeared that the plaintiff's and defendant's houses adjoined one another and were dependent upon one another for support. Both had been built by and had belonged to one person, and it did not appear which was first granted by him. The Court held that this made no difference. "We are all of opinion," said Pollock, C. B., "that where houses have been erected in common by the same owner upon a plot of ground, and therefore necessarily requiring mutual support, there is, either by a presumed grant or by a presumed reservation, a right to such mutual support; so that the owner who sells one of such houses, as against himself, grants such right, and on his own part also reserves the right; and consequently the same mutual dependence of one house upon its neighbours still remains."

*Richards v. Rose.*

[In *White v. Bass* (a) the point was directly raised; and the dictum of Lord Holt above referred to was adopted as law. In this case it appeared that the owners in fee of a house and adjoining land (which had never been held separately) had

*White v. Bass.*

(y) Cf. *Hall v. Lund* (1863), 1 H. & C. 676. *v. Armstrong* (1897), 77 L. T. 62.]

(z) (1853), 9 Exch. 218. [Dist. *Howarth*

(a) (1862), 7 H. & N. 722.

No implied  
reservation.

*White v. Bass.*

[demised the land to certain trustees, who covenanted to build upon it according to a certain plan. The owners afterwards conveyed the reversion of the land to the trustees, and then the house to the predecessor in title of the plaintiff. The defendant subsequently, with the authority of the trustees, built upon the land so as to obstruct certain windows of the plaintiff which existed at the date of the lease. He did not build according to the plan above referred to; if he had done so, the windows would have been obstructed, but not to the same extent. It was held (*b*) that the defendant was not liable for obstructing the plaintiff's windows, either as to so much light and air as would have been shut out if he had built according to the plan, or as to the excess. All the judges agreed that the lease, being merged, did not affect the case.

In *Pearson v. Spencer*, in the Exchequer Chamber (*c*), *Pyer v. Carter* was cited and discussed by the judges. Martin, B., says: "I thought that a strange decision, but it has recently been confirmed by the House of Lords."

*Dodd v.  
Burchell.*

In *Dodd v. Burchell* (*d*) the parties claimed under the same person. By the side of the plaintiff's house was a passage leading to the defendant's. In the plaintiff's house was a side door opening into the passage; a door from his garden also opened into the passage. The common owner having first conveyed part of the passage to the defendant, extending beyond the garden door, it was held that no right of way from the garden door, or between the house and garden door, could be implied. Martin, B., there says: "*Pyer v. Carter* went to the very extent of the law, but if considered cannot be complained of; for, if a man has two fields drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the grantee can stop up the drain, for there would be the same right of drainage as before, for the land was sold with the drain in it."

*The Curriers'  
Company v.  
Corbett.*

In the case of *The Curriers' Company v. Corbett* (*e*), the plaintiffs claimed an injunction in respect of injury to the light of their houses, caused by houses erected by the defendant upon the opposite side of the street. One of the erections complained of

(*b*) By Pollock, C. B., and Martin, Channell, and Wilde, BB.

(*c*) (1863), 3 B. & S. 762; above, p. 146. The reference is no doubt to *Ewart v. Cochrane* (above, p. 123), which

is not a direct confirmation of *Pyer v. Carter*.

(*d*) (1862), 1 H. & C. 113.

(*e*) (1865), 2 Dr. & Sm. 355.

[was built upon land formerly sold to the defendant by the plaintiffs; and as to this erection V.-C. Kindersley, following *White v. Bass*, held that the plaintiffs were not entitled to relief. There was no appeal from this part of the judgment; but, on the hearing of an appeal by the defendant from the remainder of the judgment (f), Turner, L. J., used words which show that he also considered the decision in *White v. Bass* to be law.

No implied reservation.

*The Curriers' Company v. Corbett.*

In *Suffield v. Brown* (g), the decision in *Pyer v. Carter* was again declared to be incorrect. The decision in this case must, indeed, have been the same, although *Pyer v. Carter* and the doctrine of implied reservation had been accepted in their entirety; but Lord Westbury expressly disapproved of *Pyer v. Carter*, and based his decision upon principles inconsistent with it.

*Suffield v. Brown.*

The facts of the case were as follows:—The plaintiffs owned a dock situate on the Thames at Bermondsey, and used for repairing ships; the defendant owned a coal wharf adjoining the dock. Both tenements had once belonged to the same owner; and during the joint ownership, whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across a strip of land forming part of the wharf. In 1845 the common owner sold and conveyed the wharf and strip of land, without any reservation, to the predecessor in title of the defendant; and shortly afterwards he conveyed the dock to those persons under whom the plaintiffs claimed (h). The defendant began to build a warehouse on the strip of land; and the plaintiffs sought to restrain him from building so as to prevent the bowsprits of large ships lying in the plaintiffs' dock from overhanging the land as theretofore, claiming an easement for this purpose as reserved by implication by the common owner.

Lord Romilly granted the injunction (i), on the ground that the projection of the bowsprit was essential to the full and complete enjoyment of the dock as it stood at the time when the wharf was sold, and that the purchaser of the wharf had distinct notice of the necessity from the appearance of the property. His Lordship seems to have considered the easement to be apparent, because it

(f) 4 D. J. & S. 764, at p. 771.

(g) (1863), 9 Jur., N. S. 999; on appeal, 4 De G. J. & S. 185.

(h) The particulars of sale of the properties represented the dock as capable of holding vessels of large

size; but whatever argument might have been founded on this fact was perhaps considered not to be available after conveyance without rectification of the deeds; see below, p. 165, note (z).

(i) 9 Jur., N. S. 999.

No implied  
reservation.

*Suffield v.  
Brown.*

[could not be exercised without the exercise being seen—an argument which would apply also to a right of way. He does not appear to have dealt with the question of continuity.

The appeal (*k*) was heard by Lord Westbury, then Lord Chancellor, who reversed Lord Romilly's decision. After referring to the opening words of this chapter, and observing that the author uses the word "grant" so as to include reservation, he continues: "But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor. Consider the easements as if they were rights, members and appurtenances of the adjoining tenement: they still admit of being aliened or released; and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner. Many rules of law are derived from fictions; and the rules of the French Code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of 'père de famille,' and impressing upon the different portions of his estate mutual services and obligations, which accompany such portions when divided among them (*l*), or even, as it is used in French law, when aliened to strangers. But this comparison of the disposition of the owner of two tenements to the 'destination du père de famille' is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided. For, when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burthen imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such ownership."

(*k*) 4 De G. J. & S. 185.

(*l*) *I.e.*, when the portions are distributed among the members of the family.

[Commenting upon the expression of the judges in *Pyer v. Carter* (m), that the purchaser takes the house "such as it is," his Lordship says, "But, with great respect, the expression is erroneous, and shows the mistaken view of the matter; for, in a question (as this was) between the purchaser and the subsequent grantee of the vendor, the purchaser takes the house, not 'such as it is,' but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer v. Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. . . . I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority."

No implied reservation.

*Suffield v. Brown.*

After commenting upon the cases before *Pyer v. Carter*, to which he sees no objection, his Lordship concludes as follows:—"But if any part of this theory (the theory of implied reservation) were consistent with law, it would not support the decree appealed from. For the easement claimed by the plaintiff is not 'continuous;' for that means something the use of which is constant and uninterrupted. Neither is it an 'apparent' easement; for, except when a ship is actually in the dock with her bowsprit projecting beyond its limit, there is no sign of its existence. Neither is it a 'necessary' easement; for that means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all. But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made."

In *Crossley v. Lightowler* (n), the defendants, who had sold to the plaintiffs certain land by the side of a watercourse, claimed to pollute the water, on the ground (among others) that they were in the habit of doing so at the time of the sale, and that the exercise of this right, being apparent and continuous, was impliedly reserved on the sale of the land to the plaintiffs. Lord Chelmsford, C., in dealing with this point, referred to Lord Westbury's decision in *Suffield v. Brown*, and said:—"I entirely agree with this view. It seems to me to be an immaterial circumstance that the easement should be apparent and continuous; for non constat that the grantor does not intend to relinquish it

*Crossley v. Lightowler.*

(m) (1857), 1 H. & N. 916; above, p. 158.

(n) (1867), L. R. 2 Ch. 478.

No implied reservation.

[unless he shows the contrary by expressly reserving it. The argument of the defendant would make in every case of this kind an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity.”

*Morland v. Cook.*

*Morland v. Cook* (o), the case of the sea wall, turned upon a different point, the question of the liability of an assignee of land to a covenant entered into by a former owner. But, in the course of his judgment, Lord Romilly, M. R., again treated *Pyer v. Carter* as an authority, and defended against Lord Westbury his judgment in *Suffield v. Brown*, which he rested upon the doctrine of constructive notice (p).

*Watts v. Kelson.*

In the course of the argument in *Watts v. Kelson* (q), referred to above (r), Mellish, L. J., is reported to have said, “I think that the order of the two conveyances in point of date is immaterial, and that *Pyer v. Carter* is good sense and good law; most of the common law judges have not approved of Lord Westbury’s observations on it.” And James, L. J., added: “I also am satisfied with the decision in *Pyer v. Carter*.”

*Ellis v. Manchester Carriage Co.*

In *Ellis v. Manchester Carriage Company* (s), *White v. Bass* (t) and *Curriers’ Company v. Corbett* (u) were followed by Grove and Denman, JJ., without remark. The dicta in *Watts v. Kelson* were not quoted.

*Wheeldon v. Burrows.*

In *Wheeldon v. Burrows* (x) the question was again raised; and after full argument, the decision in *White v. Bass* (t) was expressly followed and approved by a Court of Appeal consisting of Lords Justices James, Baggallay, and Thesiger; and *Pyer v. Carter* (y), so far as it rested upon the doctrine of implied reservation pure and simple, was declared to be overruled. In this case one Tetley was the owner of property in Derby, including a silk manufactory and some vacant land adjoining. In one of the workshops of the manufactory were some windows which opened upon the vacant land. Tetley first sold and conveyed the vacant land to the plaintiff’s predecessor in title, and

(o) (1868), L. R. 6 Eq. 252; see this case commented on in *Austerberry v. Corporation of Oldham* (1885), L. R. 29 Ch. Div. at p. 774.

(p) See also *Davies v. Scar* (1869), L. R. 7 Eq. 427.

(q) (1870), L. R. 6 Ch. 166.

(r) Page 125.

(s) (1876), L. R. 2 C. P. D. 13.

(t) (1862), 7 H. & N. 722.

(u) (1865), 2 Dr. & Sm. 355.

(x) (1879), L. R. 12 Ch. Div. 31.

(y) (1857), 1 H. & N. 916.

[then sold the manufactory to the defendant. The defendant claimed for his manufactory an easement of light and air over the plaintiff's property, and argued that such an easement, as continuous and apparent, was reserved by implication upon the sale of the vacant land (z). This claim was negatived by Bacon, V.-C., who explained all the cases in which any reservation had been implied as cases of necessity, and said that in this case it was not 'necessary' that the windows in the workshop should exist. The judgment of the Court of Appeal, affirming this decision, was expressed by Lord Justice Thesiger.

No implied  
reservation.

*Wheldon v.  
Burrows.*

After stating the facts, the Lord Justice continued as follows:—"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that, on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed (a), there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations on this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant."

His Lordship then went through the principal decisions seriatim, in order to show that they illustrated these rules. He treated

(z) Both properties had been put up for sale under one set of conditions, the defendant's tenement not being then sold. A point was raised on this, but was held to be untenable after con-

veyance executed.

(a) Clearly, the Lord Justice does not mean that these words are necessary in order to bring the case within the operation of the rule.



No implied  
reservation.

*Wheldon v.  
Burrows.*

[*Nicholas v. Chamberlain* (b) as probably a case of necessity, and considered *Pyer v. Carter* (c) as the only break in the current of authority against the doctrine of implied reservation. After dealing with the exception to the rule in cases of necessity, which is illustrated by *Pinnington v. Galland* (d) and *Davies v. Sear* (e), he continued as follows:—"Upon the question whether there is any other exception I must refer both to *Pyer v. Carter* (c) and to *Richards v. Rose* (f); and although it is quite unnecessary for us to decide the point, it seems to me there is a possible way in which these cases can be supported without in any way departing from the general maxims upon which we base our judgment in this case. I have already pointed to the special circumstances in *Pyer v. Carter*; and I cannot see that there is anything unreasonable in supposing in such a case, where the defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right or wrong comes for discussion, to consider that point. *Richards v. Rose* (g), although not identically open to exactly the same reasoning as would apply to *Pyer v. Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other: is there anything unreasonable—is there not, on the contrary, something very reasonable—to suppose in that case that the man who takes a grant of the house first and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own" (h) ?

The Lord Justice concluded by distinguishing this case from

(b) (1607), Cro. Jac. 121; above, p. 118.

(c) (1857), 1 H. & N. 916; above, p. 158.

(d) (1853), 9 Exch. 1.

(e) (1869), L. R. 7 Eq. 427.

(f) (1853), 9 Ex. 218; above, p. 159.

(g) (1853), 9 Ex. 218.

(h) Cf. the observations of Cockburn, C. J., in *Angus v. Dalton*, L. R. 3 Q. B. D. at p. 116.

[*Swanborough v. Coventry*, and *Compton v. Richards*, quoted above (i), which appear to constitute another exception to the rule, on the ground that here there was no simultaneous sale, the facts commencing with an absolute conveyance. James, L. J., who concurred, was disposed to treat *Nicholas v. Chamberlain* (k) as a case of parcels, the conduit being treated as a corporeal part of the house, "just as in any old city there are cellars projecting under other houses" (l).

No implied reservation.

*Wheeldon v. Burrows*.

*Wheeldon v. Burrows* has been often followed (m), and must now be regarded as settled law.

But in *Russell v. Watts* (n), while the authority of *Wheeldon v. Burrows* was not questioned, the House of Lords came to the conclusion that the grantor had, in the case before them, in fact reserved an easement of support.

Implied reservation.

*Russell v. Watts*.

The following were the material facts:—In March, 1866, the Corporation of Liverpool granted to one Jeffery seven leases of as many adjoining plots of land, subject to covenants binding him and his assigns to build on the several plots according to plans to be approved by the council of the borough, and to keep the buildings in repair. The buildings were to be connected internally so as to form one large edifice, but were to be separable at any time by closing the internal communications. The plans, as approved by the council, showed a building on one of the plots (B), divided from another plot (C) by a main wall standing on the boundary between (B) and (C), so as to be partly in (B) and partly in (C); and in this wall were shown windows looking out from (B) into a court-yard forming part of (C). The plans also showed the building plot (B) divided from a third plot (E) by a similar wall, also situate on the boundary line between these two plots, and having windows overlooking (E).

In June, 1866, the main wall with the window spaces between (B) and (C) being almost completed (o), Jeffery mortgaged plot (C).

(i) Pages 130 and 128.

(k) (1607), Cro. Jac. 121.

(l) Cf. *Francis v. Hayward* (1882), L. R. 22 Ch. Div. 177; *Laybourn v. Gridley*, [1892] 2 Ch. 53.

(m) See *Allen v. Taylor* (1880), L. R. 16 Ch. D. 355; *Russell v. Watts* (1885), L. R. 10 App. Cas. 590; *Watson v. Troughton* (1883), 48 L. T. 508; *Tauce v. Knowles*, [1891] 2 Q. B. 564; *Hewarth v. Armstrong* (1897), 77 L. T. 62; *Union Lighterage Co. v. London Graving Dock Co.*, [1901] 2 Ch. 300;

on appeal, [1902] 2 Ch. 557; *Ray v. Hazeldine*, [1904] 2 Ch. 17; and the mining cases quoted below, Part III. Chap. IV., including *Love v. Bell* (1884), L. R. 9 App. Cas. 286.

(n) (1885), L. R. 10 A. C. 590; cf. *Hayles v. Pease and Partners, Ltd.*, [1899] 1 Ch. 567; *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256.

(o) Per Lord Selborne, L. R. 10 A. C. at p. 600; contra, the statement in 25 Ch. Div. at p. 564.

Implied  
reservation.

*Russell v.  
Watts.*

[In September, 1866, he mortgaged plot (E). In December, 1866, he mortgaged plot (B). In 1867 or 1868 the buildings were completed without any interference on the part of the mortgagees. Ultimately all the mortgagees foreclosed; and, the mortgagees of (C) and (E) having blocked up the windows in the dividing walls above referred to, the mortgagee of (B) brought this action.

Obviously, it followed from *Wheeldon v. Burrows* that, on the occasion of the mortgages of (C) and (E), there was no implied reservation of an easement of light to the windows in question. But Bacon, V.-C., decided for the plaintiff; and his decision, reversed by the Court of Appeal, was restored by the House of Lords.

The Vice-Chancellor's judgment proceeded chiefly on the ground that the owners of (C) and (E), having without objection permitted the dividing walls to be completed and the windows to be opened according to the plans, could not afterwards turn round and block up the windows; and Lindley, L. J., who dissented from the judgment of the majority of the Court of Appeal, apparently took the same view. But the Lords Justices Cotton and Fry, who constituted the majority of the Court, pointed out that Jeffery and the mortgagees of (B) were under no misapprehension as to their rights, so that the doctrine of acquiescence did not apply (*p*).

The decision of the House of Lords proceeded on somewhat different grounds. As to the windows looking on to (C), Lord Selborne relied upon a clause in the mortgage of June, 1866, whereby it was agreed and declared between and by the parties that Jeffery should build on the mortgaged land "such erections, buildings, and conveniences" as should in all respects correspond to the plans approved of by the surveyor to the mortgagees. The dividing wall, he said, with the windows in question, was, as to part of its thickness, to be erected on (C); and, as to this part, Jeffery was entitled to the benefit of the agreement. The mortgagees had therefore agreed that a part of the outer wall of house (B) might stand within the verge of (C), and should have in it particular windows opening upon and overlooking (C); and they could not now obstruct these windows. He also thought that the principle of the cases (*q*) upon covenants between vendors and purchasers as to general plans of building, was applicable.

(*p*) Above, p. 67.

(*q*) *Whatman v. Gibson* (1839), 9 Sim. 196; 47 R. R. 214; *Coles v. Sims* (1853),

*Kay*, 56; *Child v. Douglas* (1854), *Kay*, 560.

[In the mortgage of (E), the mutual covenants above referred to were not found ; but it recited the lease to Jeffery, and assigned the buildings "then standing and being or in course of erection" upon the land. The mortgagee thus became lessee by assignment of the lease and buildings in statu quo, with notice (as from the facts his Lordship inferred) of the general plan on which they had been built, on the footing of which all Jeffery's expenditure had been made, and in which both the corporation, as lessees of the estate, and Jeffery, as lessee of the premises demised by the other leases, were interested. The mortgagee could not under these circumstances interfere with the masonry of the wall which crossed his boundary ; and, if restricted so far, he was restricted also as to the lights in the wall.

Implied  
reservation.

*Russell v.  
Watts.*

Lord Fitzgerald agreed with Lord Selborne, and laid stress on the "common interdependent design" to be gathered from the plans.

Lord Blackburn, who dissented, differed from Lord Selborne as to the construction of the covenant above referred to.

The case rested on very special circumstances, which are scarcely likely to occur again.

The same observation perhaps applies to *Thomas v. Owen* (r). There the plaintiff and defendant were yearly tenants of adjoining farms under one landlord ; and a made and fenced lane ran over the defendant's farm and led to the farm occupied by the plaintiff. In 1873 the defendant's farm was demised to him for a term, the area of the lane being included in the demise and no right of way over it being expressly reserved. In 1878 the landlord demised to the plaintiff the farm occupied by him with the "appurtenances thereto belonging." A contest having arisen, it was held that the plaintiff had a right of way over the lane. The Court relied on the fact that at the date of the lease of 1873 the plaintiff had a yearly tenancy of his farm with an implied right to use the lane as a road "subsisting visibly for the convenience of the plaintiff's farm," and they apparently took the view that in order to support this right a reservation from the defendant's lease must be implied ; and that not only during the continuance of the plaintiff's yearly tenancy, but during the whole term of the defendant's lease (s).]

*Thomas v.  
Owen.*

(r) (1887), L. R. 20 Q. B. Div. 225. It does not appear by the report that *Wheeldon v. Burrows* was cited, but doubtless it was present to the minds

of the Court.

(s) Compare *Coutts v. Gorham*, cited above, p. 126. If the principle applied in that case had been applied here, the

Implied  
reservation.  
Civil law.

The current of authority in the civil law is in favour of the position, that all servitudes, indiscriminately, were extinguished by unity of ownership, and that none were revived by a subsequent severance, except possibly those of necessity (*t*). And, although it was competent to the owner of two tenements, on alienating one of them, to impose a servitude upon it, for the benefit of the one he still retained, or vice versa (*u*), and such imposition, even though in terms, binding on the person of the possessor only, would, nevertheless, bind the servient tenement into whosoever hands the two tenements respectively might pass (*x*); yet, unless the precise nature of the servitude was specified upon alienation, no obligation whatever was imposed. The general expression, "quibus est servitus utique est," was binding as to strangers only; and even the general reservation, that the alienated tenement "should be servient," appears to have been insufficient to prevent the vendee from disturbing the servitudes of his vendor.

It would appear, however, that the insertion of the clause "quibus est servitus utique est," would, in such a case, prevent the purchaser of one tenement from disturbing a manifestly existing servitude of the other, supposing the owner to alienate both at the same time (*y*). On the other hand, there is one

plaintiff would have failed, the landlord not having reserved the right of way on granting the lease of 1873, and the plaintiff taking his lease in 1878 out of the reversion which the landlord then had. See *Gordon v. Ogilvie* (1899), 15 Times L. R. 239.

(*t*) Marcellus respondit, qui binas sedes habebat, si alteras legavit, non dubium est quin hæres (alias) possit altius tollendo obscurare lumina legatarum sedium. Non autem (semper) simile est itineris argumentum: quia sine accessu nullum est fructus legatum: habitare autem potest et sedibus obscuratis.—Dig. 8, 2, 10, de serv. præd. urb.

[Sed ita officere luminibus et obscurare legatas sedes conceditur ut non penitus lumen recludatur, sed tantum relinquatur quantum sufficit in usus diurni moderatione.—Ibid.]

(*u*) Duorum prædiorum dominus, si alterum eâ lege tibi dederit, ut id prædium, quod datur, serviat ei quod ipse retinet, vel contra: jure imposita servitus intelligitur.—Dig. 8, 4, 3, comm. præd.

(*x*) Cum fundo, quem ex duobus re-

tinuit venditor, aquæ ducendæ servitus imposita sit, empto prædio quæsitæ servitus distractum denuo prædium sequitur; nec ad rem pertinet, quod stipulatio, qua penam promitti placuit, ad personam emptoris, si ei forte frui non licuisset, relata est.—Dig. 8, 3, 36, de serv. præd. rust.

In tradendis unis sedibus ab eo qui binas habet, species servitutis exprimenda est: ne si generaliter servire dictum erit, aut nihil valeat quia incertum sit quæ servitus excepta sit, aut omnis servitus imponi debeat.—Dig. 8, 4, 7, comm. præd.

Si cum duas haberem insulas duobus eodem momento tradidero, videndum est, an servitus alterutris imposita valeat: quia alienis quidem sedibus nec imponi nec adquiri servitus potest; sed, ante traditionem peractam suis majoris acquirit vel imponit is qui tradit, ideoque valebit servitus.—Dig. 8, 4, 8, Ibid.

(*y*) Quidquid venditor servitutis nomine sibi recipere vult, nominatim recipi oportet. Nam illa generalis receptio, "quibus est servitus utique est," ad extraneos pertinet, ipsi nihil pro-

passage in the Digest which distinctly recognizes the principle of the disposition by the owner of two tenements (s).

Implied  
reservation.  
Civil law.

### SECT. 2.—*Easements of Necessity.*

Another class of easements acquired by implied grant are those which are usually termed "Easements of Necessity," though they might with more correctness be called—Easements incident to some act of the owners of the dominant and servient tenements, without which the intention of the parties to the severance cannot be carried into effect (a).

Nature of  
easements of  
necessity.

The easement called a Way of Necessity is, in reality, only a single species of this class, and is necessary "only in a partial sense, as being a necessary incident" (b) to the instrument creating the estate to which the easement is appendant.

Ways of necessity, of a different kind, are mentioned by Dodderidge, J., in *Shury v. Pigott* (c),—ways "to the church or to market" (d).

Under this head, likewise, come easements incident to the rights which a party has in virtue of his office, as a right of entry in the parson to take away his tithes: *Payne v. Brigham* (e);

spicit venditori ad jura ejus conservanda: nulla enim habuit: quia nemo ipse sibi servitutem debet: quinimo, et si debita fuit servitus, deinde dominium rei servientis pervenit ad me, consequenter dicitur extingui servitutem.—Dig. 8, 4, 10, comm. præd.

(c) Bias quis sedes habebat unâ contiguatione tectas; utrasque diversis legavit. Dixi—ex regione cujusque domini fore tigna; nec ullam invicem habituros actionem, jus non esse immisum habere. Nec interest, purè utraque, an sub conditione alteri sedes legatæ sint.—Dig. 8, 2, 36, de serv. præd. urb.; [and see the Dutch "Consultation," 2 Deel, casus 145.]

(e) [In view of the above explanation of the term, it would appear to be hardly necessary to state that the owner of a tenement has no right of access thereto over lands of his neighbour, merely because he has no other means of access. There is, however, an express decision of the Court of Session to this

effect (*Menzies v. Breadalbane* (No. 2), 4 F. 59, *Mews' Digest*, 1902, col. 94). In order to found a claim to an easement of necessity, unity of ownership of the dominant and servient tenements at some time is essential, as in the absence of such unity no grant can be implied.]

(b) 1 Wms. Saund. 323a n.; 1 Notes to Saund. 570.

(c) (1625), 3 Bulstrode, 340.

(d) [These are not strictly easements, but customary rights; see above, p. 3, and below, Part III. Chap. III.]

(e) (1685), 2 Lutw. 1313. Cf. *Wiseman v. Denham* (1623), *Palmer*, 341; *Shapcott v. Mugford* (1697), 1 Ld. Ray. 187; *South v. Jones* (1720), 1 Strange, 245; 1 Rolle Rep. 172, 420; 1 Rolle Abr. 109, action on the case, N. pl. 36. In *James v. Dods* (1834), 2 C. & M. 266, the Court of Exchequer held that a rector, though entitled to the use of whatever roads existed on the farm for the purpose of carrying away his tithes,

Nature of  
easements of  
necessity.

and also a right to make the grass into hay on the land where it grew (*f*).

It would seem from an observation of *Mansfield, C. J.*, in *Morris v. Edgington* (*g*), that, although in these cases there might exist some other mode of access, yet, if the way claimed "was necessary for the most convenient enjoyment" of the thing demised, it would be a way of necessity. This doctrine, however, seems [foreign] to the principle on which the right to ways of necessity is supported; and appears to [be only another way of stating the doctrine of the disposition of the owner of two tenements, treated of in the preceding sections of this chapter.

And the rule established by recent decisions is that "an easement of necessity is one without which the property retained upon a severance cannot be used at all; not one which is merely necessary to the reasonable enjoyment of that property (*h*)."]

*Dand v.*  
*Kingscote.*

In *Dand v. Kingscote* (*i*), it was held, that under an exception of all seams of coal, and a reservation of right to dig pits for getting such coal, all things that were dependent on that right and necessary for the obtaining it were reserved also, according to the rule in *Sheppard's Touchstone*, p. 100; and that, consequently, the coal-owner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines, and draw the coals from the pits.

*Liford's Case.*

So, in *Liford's Case* (*k*), where a lessor excepted all trees of a certain age growing on the estate demised, and the lessee brought an action of trespass against certain parties claiming under the lessor, for entering upon the lands to see the condition of the

had no right except by express grant or prescription to prevent the occupier from making such alterations as were advantageous to his land, though the accustomed road was thereby stopped up, provided such alterations were made bona fide and not with any vexatious intention towards the tithe-owner.

(*f*) 1 Rolle, Abr. Dismes, X. pl. 3.

(*g*) (1810), 3 Taunt. 28; 12 R. R. 579.

[Cf. some observations of Bowen, L. J., in *Bayley v. Great Western Railway* (1884), L. R. 26 Ch. Div. at p. 453.]

(*h*) Per Stirling, L. J., *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557, 573; followed in *Ray v. Hazeldine*, [1904] 2 Ch. 17; and see *Titchmarsh v. Royston Water Co. Ltd.*

(1900), 81 L. T. 673.

(*i*) (1840), 6 M. & W. 174; 55 R. R. 560. [See further as to subsidiary rights of this kind, Part IV. Chap. I.; and as to the rights granted or reserved to mine-owners, *Earl of Cardigan v. Armitage* (1823), 2 B. & C. 197; 26 R. R. 313; *Proud v. Bates* (1865), 34 L. J. Ch. 406; *Ramsay v. Blair* (1876), L. R. 1 App. Cas. 701; cf. *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256. As to support, see below, Part III. Chap. IV.]

(*k*) (1615), 11 Report, 52. [See also *Foster v. Spooner* (1583), Cro. Eliz. 17; *Hodgson v. Field* (1826), 7 East, 613; 8 R. R. 701; *Hewitt v. Isham* (1851), 21 L. J., N. S., Exch. 35.]

trees, it was resolved by the whole Court, that, "when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him and them who would buy, power, as incident to the exception, to enter and show the trees to those who would have them, for without sight none would buy, and without entry they could not see them; as in 9 H. 6, 29 b, a man seised of a house in a borough, &c., devisable, devised it to a woman in tail, and, if the woman died without issue, that his executor might sell and dispose of it for his soul; in that case the executor might, by the law, enter into the house to see if it was well repaired or not, to the intent to know at what value the reversion is to be sold. Quod fuit concessum per totam curiam. The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit on the land of another to enter into the land to mend it, when occasion requires; as it is resolved 9 E 4, 35 a. So it is agreed in 2 R. 2, Bar. f. 237. If I grant you my trees in my wood, you may come with carts over my land to carry the wood. Lex est, cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit; and this is a maxim in law."

*Easements of necessity.*  
*Liford's Case.*

From this, as well as other authorities, it appears that the inference of law arises equally whether the easement is incident to a grant or a reservation (*l*).

In *Lord Darcy v. Askwith (m)*, where an action of waste was brought against the defendant for felling oak trees, the only question was—whether the lessor by leasing coal mines did, by implication of law, give power to the lessee to fell timber for the use of the coal mines. It was agreed that the grant of a thing did carry all things included, without which the thing granted could not be had. But this case was adjudged unâ voce against the defendant; for it must be understood of things incident and directly necessary. Thus, if I give you the fish in my waters, you may fish with nets, but you may not cut the banks to lay the waters dry. If I grant or reserve woods, it implies a liberty to take and carry them away.

*Lord Darcy v. Askwith.*

(*l*) [*Pinnington v. Galland* (1853), 9 Exch. 1, acc.; cf. *Wheeldon v. Burrows* (1879), L. R. 12 Ch. Div. at p. 57; *Midland Railway v. Miles* (1886), L. R. 33 Ch. D. at p. 644; and the judgments

in *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *Ray v. Hazeldine*, [1904] 2 Ch. 17.]

(*m*) (1618), Hobart, 234.



Easements of  
necessity.

In an anonymous case (*n*), it is said, per curiam, "If a man, either by grant or prescription, have a right to wreck thrown upon another's land, of necessary consequence he has a right to a way over the same land to take it."

*Reg. v.*  
*Cluworth.*

And again, in *The Queen v. Inhabitants of Cluworth* (*o*), by Holt, C. J., "If one have land adjoining on a navigable river, every one that uses that river has, if occasion be, a right to a way by brink of water over that land, or farther in, if necessary."

This general right to tow along the banks of navigable rivers is denied in *Ball v. Herbert* (*p*), unless founded either on statute or custom.

Easements of this nature are thus described in Rolle's Abridgment—

Rolle.

"If I have a field enclosed by my own land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant.

"And the grantor shall assign the way where he can best spare it.

"So, too, if the close aliened be not entirely enclosed by my land, but partly by the land of strangers; for he cannot go over the land of strangers. Quære (*q*)."

The chapter of Rolle, in which these sections occur, is headed—"In what case one thing shall pass by grant of another—Incidents"—and the first pl. is, "The grant of a thing passes everything included therein, without which the thing granted could not be had": pl. 16 is, "If a man grant or reserve wood, that implies liberty to take and carry it away;" thus evidently treating it as a necessary implication of the intention of the grantor, as in the case of all other incidents which the law attaches to grants.

Williams.

The general rule is thus stated by Serjeant Williams: "Where a man having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant,

(*n*) (1705), 6 Mod. 149.

(*o*) (1705), 6 Mod. 163.

(*p*) (1789), 3 T. R. 253; 1 R. R. 695.

[See *Conservators of River Lea v. Button*

(1881), L. R. 6 App. Cas. 685.]

(*q*) 2 Rolle, Abr. tit. Graunt, Z. pl. 17, 18; 1 Wms. Saund. 323, n.; 1 Notes to Saund. 570; Vin. Abr. Grantz, Z. pl. 17, 18.

for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself (r)."

Ways of  
necessity.

In *Jorden v. Atwood* (s), the defendant was seised of a messuage which had a way appendant to it over a certain close. It appears to be admitted in the argument that there was no other way to the house. This close the defendant bought, and afterwards enfeoffed the plaintiff thereof, making no reservation of the way; and the present action was brought for the defendant continuing to use the way. The judges differed in opinion, some holding that the way was not extinguished; others, that it was the defendant's own folly not to have reserved it; but judgment was given for the defendant. But it is stated in 2 Sid. 111, that, on searching the roll in this case, it was found that judgment was given for the plaintiff.

*Jorden v.*  
*Atwood.*

In *Packer v. Welsted* (t) there was a special verdict, finding that there were three parcels of land, and the necessary and private way was out of the first into the second, and out of the two first into the third parcel. J. S. purchased the three parcels, and then aliened the two first to J. N.; and the question was, if he should have a way over the two first parcels to his third parcel. The jurors also found that the alienation was by feoffment, and that there was no other way to come at the land not aliened but over the other land. After two arguments, the Court gave judgment for the defendant, "that he might take a convenient way without permission (sans le gree) of the plaintiff, and the law would then adjudge whether such way were convenient and sufficient or otherwise." Glyn, C. J., observed, "That it could not properly be called a right of way (before the alienation), because no man could have such right in his own soil; but that as the jurors had found the way to be of necessity, it would remain, for it would be not only a private inconvenience, but also to the prejudice of the public weal, that the land should be fresh and unoccupied."

*Packer v.*  
*Welsted.*

In *Dutton v. Taylor* (u), which was an action of trespass q. o. f., the defendant justified as tenant to one R. Cleadon, who was seised simul et semel of two closes, the only road to the second from an

*Dutton v.*  
*Taylor.*

(r) 1 Wms. Saund. 323, n.; 1 Notes to Saund. 570. [This statement of the law by Serjeant Williams was recognized and acted on by the Court of Exchequer in *Pinnington v. Galland* (1853), 9 Exch. 12.]

(s) (1606), Owen, 121. See Rol. Abr.

and Vin. Abr. Extinguishment, C. pl. 8, 10, 11; Vin. Abr. Common, E. a. pl. 16.

(t) (1657), 2 Siderfin, 39—111.

(u) (1701), 2 Lut. 1487; *Buckby v. Coles* (1814), 5 Taunt. 311; 15 R. R. 508.

Ways of necessity.*Dutton v. Taylor.*

ancient highway being across the first close; this latter close Cleadon sold to one Astbury, but still continued to use the way across it, although there was no reservation of any right of way in the deed of conveyance. It was objected, the law would not imply any reservation by the vendor where none was expressed, sed non allocatur. "For it is apparent by the plea, that it is a way of necessity, and it is pro bono publico that the land should not be unoccupied."

*Howton v. Frearson.*

In *Howton v. Frearson* (x) the Court held that a way of necessity over the grantor's land would equally be implied as incident to a grant, though the granting party was a trustee: but Lord Kenyon expressed doubts as to the correctness of the general principle laid down in the case above cited.

*Clark v. Cogge.*

In *Clark v. Cogge* (y), upon demurrer, the case was—"The one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the plaintiff's land, there being no other convenient way adjoining, and whether this was a lawful claim was the question; and resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his land. Et e converso—If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any land thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law: and there is not any extinguishment of a way by having both lands."

The concluding observation evidently refers to the kind of way here spoken of—a way of necessity; but whether it does or not is immaterial to the authority of the case, which did not turn upon any question of extinguishment, but upon the new title implied by law.

*Pinnington v. Galland.*

[In *Pinnington v. Galland* (z), the owner of two closes, one of which was only accessible over the other, conveyed the former to A., the latter to B., and it did not appear which conveyance was first executed, but the conveyance to A. contained the words, "with all ways belonging or appertaining." The Court held that, whichever was first conveyed, A. had a way over B.'s close; for, if the conveyance to A. was first, A. would have a way

(x) (1798), 8 T. R. 50; 4 R. R. 581.

(y) (1607), Cro. Jac. 170.

(z) (1853), 9 Exch. 1.

[of necessity by implied grant, and if the conveyance to B. was first, then the owner of the remaining close would have had a way of necessity by implied reservation, which, upon the conveyance to A., passed to him by the words all ways appertaining, or, indeed, as the Court suggested, without those words,—and this for the same reason which originally created it, that the way was necessary to the enjoyment of the land granted, and therefore would pass without express words; and, these two things concurring, the grantee would have the way upon the principle of the maxim, “Cuicunque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit,” just as if the grantor of the land were owner of the adjacent land, instead of being only the owner of a way over it.

Ways of  
necessity.

*Pinnington  
v. Gailand.*

In *Davies v. Sear* (a), the way claimed was not actually necessary at the date of the severance, as there was other access to the premises retained; but the grantee had notice that the grantors were bound, under an existing contract, to stop up this other approach, so as to leave no access except by the way claimed. Lord Romilly treated the case as one of necessity; but there were other grounds for his decision.]

*Davies v.  
Sear.*

The accessorial right which the law thus confers is to be measured by the nature of the grant or reservation to which it is incident (b).

Extent of the  
right.

[As illustrating the question of the extent of the right, *Corporation of London v. Riggs* (c) may be quoted. There the owner of a close surrounded by his own land, and theretofore used only as agricultural land, having granted away the surrounding land and reserved the close, claimed a way of necessity for all purposes over the surrounding land. Jessel, M. R., held that he was entitled to a way for agricultural purposes only. He thought that the implied reservation operated by way of re-grant, and that the re-grant was limited by the necessity which created it; and *Ray v. Hazeldine* (d) is to the same effect.

In *Serff v. Acton Local Board* (e), on the other hand, where land was taken by a local board under its compulsory powers for the purpose of sewage works, the necessary right of way was held

(a) (1869), L. R. 7 Eq. 427, above, p. 149; cf. *Gayford v. Moffatt* (1868), L. R. 4 Ch. 133.

M. & W. 174; 55 R. R. 560.

(c) (1880), L. R. 13 Ch. D. 798.

(d) [1904] 2 Ch. 17.

(e) (1886), L. R. 33 Ch. D. 679.

(b) See *Dand v. Kingscote* (1840), 6 G.

Ways of  
necessity.

[to extend to all purposes for which it could be required for sewage works.

Duration of  
the right.

The question of the duration of the right has been discussed in several cases; and it has been held to cease, when it is no longer required in order to render the grant or reservation effectual.]

*Holmes v.  
Goring.*

In *Holmes v. Goring* (*f*) the defendant, having been previously entitled to a way of necessity over certain closes, purchased these closes, together with certain other pieces of land adjoining the close to which the way of necessity led: he subsequently sold two of the closes over which the way of necessity had been used, together with some portions of the land adjoining, which prevented his having access over his own land to those closes to which the right of way had originally been enjoyed. These portions had, however, been repurchased by him long before the present action was brought, at which time he could have had as convenient access over his own land as over that occupied by the plaintiff. The question to be decided was, whether the way of necessity—which was admitted to have existed when the defendant sold the close now occupied by the plaintiff—was defeated by the fact, that, by a subsequent purchase, he was enabled to approach the close to which, &c., over his own land; the defendant contending that the necessity of the way was to be considered with reference to the condition of the property at the time of the sale of the two closes.

The Court held that the way of necessity ceased as soon as the defendant had any other means of access to the close to which it led. "A way of necessity," said Best, C. J. (citing Serjeant Williams' note to Saunders), "when the nature of it is considered, will be found to be nothing else than a way by grant; but a grant of no more than the circumstances which raises the implication of necessity require should pass (*g*). If it were otherwise, this inconvenience might follow, that a party might retain a way over one thousand yards of another's land, when, by a subsequent purchase, he might reach his destination by passing over one hundred yards of his own. A grant, therefore, arising out of the implication of necessity cannot be carried further than the necessity of the case requires, and this principle consists with all the cases which have been decided." Park, J., added, "From all the authorities re-

(*f*) (1874), 2 Bing. 76; S. C. 9 Moore, 166.

(*g*) [Cf. *Maenaghten v. Baird*, [1903] 2 Ir. R. 731; cited above, p. 155.]

ferred to, it is clear that when a way is claimed by necessity, it is a good answer to show that there is another way which the party may use." Burrough, J., expressed his opinion to be, "That there must be a necessity continuing up to the time of the trespass justified under it."

Duration of  
easement of  
necessity.

*Holmes v.  
Goring.*

The opinion here expressed by Burrough, J., appears to be in accordance with the decision of the Court of King's Bench in *Reignolds v. Edwards* (h). The defendant's lessor had a prescriptive right of way over the plaintiff's land to a close which was encircled by land of the plaintiff. Twenty-four years before the action was brought, the plaintiff stopped up the old way and opened a different one, which latter, after being used by the defendant's lessor during that period, the plaintiff also stopped up, and brought the present action of trespass for the use of it by the defendant, and his removal of a gate erected across it by the plaintiff. The Court held that the new way could not be claimed as a way of necessity, as it did not appear "that there was no other way, but only that there was no other passage open"; and that, as the plea set forth a right of way by prescription, which the plaintiff had admitted by demurring to the plea, that was sufficient to prevent the defendant being entitled to this as a way of necessity. That it was, in fact, but a way of sufferance, and upon the plaintiff determining his will by erecting the gate, the defendant should have had recourse to his old right.

*Reignolds v.  
Edwards.*

The case of *Buckby v. Coles* (i) appears from the facts as stated in the report to be somewhat at variance with the doctrine above laid down, as, during the time in which there was a unity of the whole property, there appeared to have been another approach to the close to which, &c., besides the previously existing way of necessity, and, as this new approach existed at the time of severance, the former necessity must, of course, have ceased. There appears, however, to be some confusion in the facts, as the jury expressly found, that, at the time of the trespass for which the action was brought, there existed no other way but the one claimed by the defendant. Dallas, J., said, "The question on the issue is, whether there was any other way? The evidence on the defendant's side is, that there was no other way. The plaintiff meets it by evidence that there was another way, though not quite so convenient; and the jury have had it before them,

*Buckby v.  
Coles.*

(h) (1742), Willes, 282.

(i) (1814), 5 Taunt. 311; 15 R. R. 508.

Duration of  
easement of  
necessity.

*Buckby v.*

*Coles.*

*Proctor v.*  
*Hodgson.*

and have disaffirmed the existence of any other way." This case is therefore, in fact, [not inconsistent with] the case of *Holmes v. Goring* above cited.

[The decision in *Proctor v. Hodgson* (*k*) turned upon a point of pleading. But, in the course of the argument, Parke, B., said, "The extent of the authority of *Holmes v. Goring* is that, admitting a grant in general terms, it may be construed to be a grant of a right of way as from time to time may be necessary. I should have thought it meant as much a grant for ever as if expressly inserted in a deed, and it struck me at the time the Court was wrong; but that is not the question now." And Alderson, B., added, "Probably, if this case be taken to a court of error, *Holmes v. Goring* will be reviewed."

*Barkshire v.*  
*Grubb.*

Again, in the course of the argument in *Barkshire v. Grubb* (*l*), Fry, J., being referred to *Holmes v. Goring* and *Proctor v. Hodgson*, said, "I thought that the necessity must be judged of at the date of the conveyance; but the proposition laid down in *Holmes v. Goring* seems to have been only a dictum, for there appears to have been no necessity at the date of the grant." Some of the grounds of the decision in this case seem to be inconsistent with the principle laid down in *Holmes v. Goring*.

*Holmes v.*  
*Goring*  
shaken.

*Holmes v. Goring*, therefore, though never overruled, must be looked upon as doubtful authority (*m*).]

All easements  
extinguished  
by unity.

In the cases already cited the expression frequently occurs, that ways of convenience are extinguished by unity of possession, but ways of necessity are not. It appears, however, to be more correct, as well as more in accordance with the general principles of the law of easements, as recognized both by the English and Civil law, to consider all easements, whether of convenience or necessity, as extinguished by unity; but that, upon any subsequent severance, easements which, previous to such unity, were easements of necessity, are impliedly granted anew in the same manner as any other easement which would be held by law to pass as incident to the grant. Had there been a unity from time immemorial, the law would clearly imply a right of way as incident to a grant, if there existed no other means of such grant taking effect. Why, then, should this anomaly of non-extinguish-

(*k*) (1855), 10 Exch. 824.

(*l*) (1881), L. R. 18 Ch. D. 616 ;  
above, p. 99.

(*m*) See and consider, *Corporation of London v. Riggs* (1880), L. R. 13 Ch. D. 798.

ment be held to be law, when the same result can be obtained from the ordinary principles regulating other easements of the same class?

Easements of necessity.

All easements extinguished by unity.

In none of the numerous cases, in which the question of extinguishment has been discussed, has it been laid down that the *same* right revived upon the severance of the tenements which existed previous to the unity. The utmost extent to which the judges go, is to say that a right of way revives, because the new grant would otherwise be inoperative. Where a party died seised of certain lands and a mill, which descended to his two daughters as coparceners, it was held that an agreement by parol between them, on making partition, that a way should be used to the mill as during the lifetime of their father, was binding on them (*n*). Brooke, in his Abridgment (*o*), says, "The way is revived; tamen videtur that it is a new way (*nouvel chimine*)."

It is clearly settled, on all the authorities, that, *during the unity*, no way or easement can *exist* in the land (*p*).

The language of Best, C. J., in *Holmes v. Goring* (*q*), fully supports the doctrine above stated, that all ways are extinguished by unity of ownership; and that ways of necessity are in reality new easements incident to the grant or reservation. "If I have four fields, and grant away two of them, over which I have been accustomed to pass, the law will presume that I reserve a right of way to those which I retain. But what right? The same as existed before? No; *the old right is extinguished*, and the new way arises out of the necessity of the thing. It has been argued that the new grant operates as a prevention of the extinguishment of the old right of way; but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity."

Serjeant Williams (*r*) says, "Where a man, having a close surrounded by his own land, grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant. What way is it the grantee shall have? Not the old, but a new way, limited by the necessity." In *Clark v. Cogge* (*s*), the Court says, that "although the grantor in such a case reserve not a way, it shall be reserved for him by law; that

(*n*) 21 Edw. 3, 2; S. C., 21 Ass. pl. 1.

(*o*) Tit. Extinguishment, pl. 15.

(*p*) *Morris v. Edgington* (1810), 3 Taunt. 24; 12 R. R. 579.

(*q*) (1824), 2 Bing. 83; 27 R. R. 549.

(*r*) 1 Wms. Saund. 323, n.; 1 Notes to Saund. 370.

(*s*) (1607), Cro. Jac. 170.



Easements of necessity.

All easements extinguished by unity.

is, not the old way, but a new way of necessity, if he hath not any other way." In *Jorden v. Atwood* (t), Popham, C. J., says, "If a man has three fields adjoining, and makes a feoffment of the middle field, the feoffee shall have a way (not the way) to this through the other close."

Direction.

[With regard to the direction of the way of necessity, it was held in *Packer v. Welsted* (u), that "defendant (who claimed a way of necessity by implied reservation upon a grant by him) poet prender un convenient chemin sans le gree del plaintiff, et ley poet puis adjudge si ceo soit convenient et sufficient vel plus ou nemy"; and this accords with the decision of the Court of Exchequer in *Pinnington v. Galland* (x), where it is laid down that the way would be "the most direct and convenient one." So that the grantee of the way would be allowed to take his way, subject only to the restriction that it should be the most direct and convenient one (y).

In 2 Rolle, Ab. Graunt, Z. 17, it is laid down, "Feffor assignera le chemin lou il poet melius ceo spare."

This is not inconsistent with the other authorities, being merely to the effect that upon the severance the grantor may assign a way if he chooses. If he does not, then the grantee, i.e. the grantee of the way, may select it.

Further, when once the way is ascertained, it cannot be altered: *Pearson v. Spencer* (z).

In the last case it seems to have been held, that where the severance creating the necessity took place by will, and during the testator's lifetime and at his death the premises were in the hands of a tenant, and there was an existing way by which the tenant used and enjoyed them, the will must be considered as granting the use of that way, although it extended over a part of the dominant tenement which might have been avoided by making a gap in a fence (a).

The Court appears to have been disposed to reconcile the passages in *Siderfin* and *Rolle*, upon the ground that the way may be assigned in the first instance in all cases by the person whose

(t) (1606), Owen, 121.

(u) (1657), 2 Sid. 111, already cited by the learned author.

(x) (1853), 9 Exch. 1.

(y) Cf. Co. Litt. 145a, "In case an election be given of two severall things, alwaies he which is the first agent, and

which ought to do the first act, shall have the election" (quoted by James, V.-C., in *Rumble v. Heygate* (1870), 18 W. R. 749).

(z) (1863), 1 B. & S. 571; affirmed 3 B. & S. 761.

(a) Cf. Dig. 8, 2, 10.

[grant gives rise to the necessity, and in *Packer v. Welsted* it was under the grant of the defendant, who retained a land-locked tenement, that the necessity arose.

Easements of  
necessity.

Direction of  
way of  
necessity.

The rule that a grantor of land to which there is no access, except over other land of his, may in the first instance and once for all assign a reasonable way, would be intelligible enough, because the law only allows any way in such case because there is no other, and it might reasonably be held not to operate if the owner, at the time of the grant, sets out a convenient way; whereas, in the case where the way arises by implied reservation (*i.e.* in cases where the grantor retains the land-locked tenement), it would be contrary to this reason to deprive the owner of the land, over which the way of necessity is claimed, of a similar privilege. It may be argued that the authorities are not to be reconciled by the coincidence pointed out in *Pearson v. Spencer*, that in both an opportunity of setting out the way was allowed to the person under whose grant the way was created, the way in one being by implied grant, in the other by implied reservation (*b*); but upon the ground that the power which the owner of the way, whether by grant or reservation, has to choose a convenient way, is subject to this, that the owner of the land over which it is claimed may, if he does so at once and once for all, set out any convenient way.

The point is one which is not likely to arise often, the question generally being whether any way exists, and not as to the direction of it; but whatever may be decided it is supposed that the rule in *Rolle* would, if supported, not be acted on to the extent of its terms, and that if the grantor can assign he must assign a reasonable way, and not "*lou il poet melius ceo spare*" (*c*).

In the judgment of Kay, J., in *Brown v. Alabaster* (*d*) the following passage occurs, "Now, as a way of necessity, I think it is difficult to support it, for the following reason. A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor, and it is quite clear that the grantor has a right himself to elect in which line, in which course,

(*b*) For an implied reservation takes effect as a re-grant; *Corporation of London v. Riggs* (1880), L. R. 13 Ch. D. 798; *Midland Rail. Co. v. Miles* (1886),

L. R. 33 Ch. D. at p. 644.

(*c*) *Bolton v. Bolton* (1879), L. R. 11 Ch. D. at p. 972.

(*d*) (1887), 37 Ch. D. 490.

Easements of  
necessity.

Direction of  
way of  
necessity.

[the way of necessity should go. Here there is no case of election. The claim is to a way over this particular road, without any right of election at all on the part of the grantor. That of itself would be enough to show it is not a way of necessity." It is conceived, however, that this statement cannot be taken quite literally, but must be subject to some qualification in respect of the reasonableness of the way assigned, and the circumstances of the case. See the remarks on the above-quoted passage of Kekewich, J., in *Titchmarsh v. Royston Water Co., Ltd.* (e).]

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(e) (1900), 81 L. T. 673.

## CHAPTER III.

## TITLE TO EASEMENTS BY PRESCRIPTION.

PRESCRIPTION may be defined to be—A title acquired by possession had during the time and in the manner fixed by law. Definition of prescription.  
 “Prescriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis” (a). After the lapse of the requisite period the law adds the rights of property to that which before was possession only (b).

“Things corporeal can alone be susceptible of possession (c). Possession.  
 Things incorporeal, that is to say, those ‘quæ in jure consistunt,’ are not in fact susceptible of possession, strictly and properly so called; but they are susceptible of a quasi possession, ‘jura non possidentur sed quasi possidentur.’ This quasi possession consists in the enjoyment of the right by him to whom it belongs. Thus, I am considered to have the quasi possession of a right of servitude when I do, on the neighbouring heritage, in the sight and with the knowledge of the proprietor of that heritage, those acts which my right of servitude entitles me to do. This quasi-possession is susceptible of the same qualities and defects as possession properly so called” (d).

To constitute a legal possession there must be not only a corporeal detention, or that quasi detention which, according to the Legal possession.  
 nature of the right, is equivalent to it, but there must be also the intention to act as owner (e). Thus, no legal possession is acquired by a man walking across the land of his friend (f), or

(a) Co. Lit. 113, b.

(b) Usucapio est adjectio domini per continuationem possessionis temporis lege definiti.—Dig. 41, 3, 3, de usurp. “The Roman law relative to prescription has been adopted into the law of Normandy, which prevails in Jersey. We profess to act on the same principles.” Per Lord Wynford in the Privy Council, 1 Knapp. 69. [See an examination of the principles of prescription by Lord Blackburn in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at pp. 817 ff.]

(c) Possideri autem possunt quæ sunt corporalia.—Dig. 41, 2, 3, de acq. poss.

(d) Pothier, tom. 4, p. 580.—Traité de la Loi Civile Française.

(e) Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.—Dig. 41, 2, 3, § 1, de acq. vel. amit. poss.

(f) Qui jure familiaritatis amici fundum ingreditur non videtur possidere, quia non eo animo ingressus est ut possideat licet corpore in fundo sit.—Dig. 41, 2, 41.

Legal  
possession.  
Possession  
must be un-  
interrupted.

using a private way, thinking it to be a public one (*g*); or unless he would do the act in defiance of opposition (*h*).

From the very definition of Prescription, an enjoyment, in order to confer a title, must have been uninterrupted both as to the manner and during the time required by law. It is not to be understood by this expression that the enjoyment of an easement must necessarily be unintermittent; although, in a great variety of cases, it would obviously be so; as in the case of windows, or rights to water. In those easements which require the repeated acts of man for their enjoyment, as rights of way (*i*), it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him—an indication that would not be afforded by a mere accidental or occasional exercise (*k*).

The continuity of enjoyment may be broken either by the cessation to use, or by the enjoyment not being had in the proper manner.

"An enjoyment of an easement for one week," said Baron Parke, in the *Monmouthshire Canal Company v. Harford* (*l*), "and a cessation to enjoy it during the next week, and so on alternately, would confer no right" (*m*).

(*g*) *Servitute usus non videtur, nisi is qui suo jure uti se credidit; ideoque si quis pro viâ publicâ vel pro alterius servitute usus sit, nec interdictum nec actio utiliter competit.*—Dig. 8, 6, 25, quem. serv. amit.

(*h*) *Si per fundum tuum nec vi nec clam nec precario commeavit aliquis, non tamen tanquam id suo jure faceret, sed, si prohiberetur, non facturum, inutile est ei interdictum de itinere actusque; nam ut hoc interdictum competat jus fundi possedisse oportet.*—Dig. 43, 19, 7, de itinere actusque privato. [See the judgment in *Dyce v. Lady James Hay*, 1 Macqueen, at p. 301.]

(*i*) *Nemo enim tam perpetuo tam continenter ire potest, ut nullo momento possessio ejus interpellari videatur.*—Dig. 8, 1, 14, de serv.

(*k*) Per Curiam in *Bartlett v. Downes* (1825), 3 B. & C. 621; 27 R. R. 436; [and in *Hollins v. Verney* (1834), L. R. 13 Q. B. Div. 304, at p. 315; and as to light, see *Smith v. Baxter*, [1900] 2 Ch. 138; *Andrews v. Waite*, [1907] 2 Ch. 500.]

(*l*) (1834), 1 C. M. & R. 631; 40 R. R. 648.

(*m*) [This does not mean a cessation in the actual user, as, for instance, by reason of the claimant having no occasion to use the easement (otherwise a right to a way or other non-continuous easement could not be acquired); it means a cessation in the user as of right, as in the case cited in the text, where the asking of permission during the period, by admitting that the person asking had no right at that time, interrupted the continuity of the enjoyment as of right. See the question discussed in *Hollins v. Verney*, ubi sup.]

In a claim by prescription at the common law, an instance of unity of possession without also unity of ownership would not prevent its establishment. "If a man have common by prescription, unity of possession of as high and perdurable an estate is an interruption of the right"; Co. Lit. 114 b; and it is in the same sense that "unity of possession" is used by Lord Mansfield in *Morris v. Edgington* (1810), 3 Taunt.

So, where the enjoyment has been had under permission asked from time to time, which, upon each occasion, amounts to an admission that the asker had then no right. Indeed, the very mode in which this enjoyment, under constantly renewed permission, operates in defeating the previous user is that it breaks the continuity of the enjoyment (*n*); and it is expressly laid down by the Court of King's Bench, in their judgment in the case of *Tickle v. Brown* (*o*), that the breaking of the continuity is inconsistent with the enjoyment during the periods of either twenty or forty years, and that for that reason evidence of the breaking of such continuity is admissible on a traverse of the enjoyment.

Possession  
must be un-  
interrupted.

The interruption here spoken of is that arising from the act of the party claiming the right. The interruption of a right claimed under the statute by any act of the servient owner will be considered hereafter (*p*).

The mode of acquiring a title to an easement by prescription may be considered with respect—

1st.—To the length of time during which the enjoyment must continue.

2nd.—To the persons against and by whom the enjoyment must be had.

3rd.—To the qualities of that enjoyment.

p. 30; 12 R. R. 579, where he speaks of a right of way or common extinguished by "unity of possession," i.e., unity of ownership.

With regard to a claim under the Prescription Act, 1832, it has been held that mere unity of actual possession, occurring at any time during the period, is sufficient to prevent a claim from being established under the Act, even though the alleged dominant and servient tenements be held under different landlords: *Onley v. Gardiner* (1838), 4 M. & W. 496; *Battishill v. Reed* (1856), 18 C. B. 696; *Damper v. Bassett*, [1901] 2 Ch. 350. Lord Hatherley's dictum in *Ladyman v. Grave* (1871), L. R. 6 Ch. at p. 768, and the reasoning of the Lords Justices in *Ecclesiastical Commissioners v. Kino* (1880), L. R. 14 Ch. Div. 213, and *Hollins v. Verney* (*ubi sup.*), appear to throw doubt upon the decisions in *Onley v. Gardiner* (*ubi sup.*) and *Battishill v. Reed* (*ubi sup.*), but in *Damper v. Bassett* (*ubi sup.*) Joyce, J.,

expressly stated that those two decisions had not been overruled or expressly disapproved of, and followed them.

The dictum of Martin, B., in *Winship v. Hudspeth* (1854), 10 Exch. p. 8, that a claim by immemorial prescription at the common law would be defeated by proof of unity of possession at any time, must not be taken as applying to mere unity of possession without unity of ownership also, which did exist in the case itself.

As to unity of seisin without unity of possession, cf. *Richardson v. Graham*, [1908] 1 K. B. 39.]

(*n*) 1 C. M. & R. at p. 631, per Lord Lyndhurst.

(*o*) (1836), 4 A. & E. at p. 383; *Beasley v. Clarke* (1836), 2 Bing. N. C. 705; 42 R. R. 704; [*Gardner v. Hodgson's Kingston Brewery Co., Ltd.*, [1901] 2 Ch. 198, *affd.* [1903] A. C. 229.]

(*p*) Post—Qualities of Enjoyment; [and see the note on Sect. 4, post.]

SECT. 1.—*The Length of Time during which the Enjoyment must be had.*

Before the  
Prescription  
Act.

By the common law an enjoyment to confer a title to an easement must have continued during a period co-extensive with the memory of man; or, in legal phrase, "during time whereof the memory of man runneth not to the contrary." To this expression a definite meaning was originally attached, as comprising the period elapsed since the year 1189. "Now, 'time of memory,'" says Blackstone, "has long ago been used and ascertained by the law to commence from the reign of Richard the First" (q)—a period adopted by analogy to the stat. 3 Edw. 1, c. 29, which fixed that as the date for alleging seisin in a real action.

The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period (r); where, however, the actual origin of the enjoyment was shown to have been of more recent date than the time of prescription, the right in earlier cases was held to be defeated.

Thus, in *Bury v. Pope* (s), "It was agreed by all the justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years; yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other's land—and it was adjudged accordingly."

This doctrine appears to have been held down to the passing of the Statute of Limitations, 21 Jac. 1, c. 16.

The period of the first year of Richard 1 was adopted as the commencement of legal memory by an equitable extension of the statute which fixed that as the period in which the demandant in a writ of right must have alleged seisin.

(q) 2 & 3 Will. 4, c. 71, s. 1.

(r) *Jenkins v. Harvey* (1835), 1 Cr. M. & R. 894; 40 R. R. 769. ["Theoretically, an ancient house at this period was a house which had existed from the time of Richard 1. Practically, it was

a house which had been erected before the time of living memory, and the origin of which could not be proved." Per Lush, J., in *Angus v. Dalton* (1877), L. R. 3 Q. B. D. at p. 89.]

(s) (1586), Cro. Eliz. 118.

Before the  
Prescription  
Act.

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"But when, by the Statute of Limitations, 3 Edw. 1, c. 39, the seisin in a writ of right was limited to the time of Richard 1, so that none could count of an older seisin, this writ being the highest writ; it was taken to be also within the equity of the statute, that though a man might prove the contrary of a thing of which prescription was made, still this should not destroy the prescription, if the proof were of a thing beyond the time of limitation. For it was reasonable that the inquiry in a prescription should be limited as well as in a writ of right, being lower than that, for it was very hard to put juries to inquire of things so old" (t).

When the shorter time of sixty years was fixed for a writ of right, and fifty years for a possessory action by 38 Hen. 8, it has been said that a similar extension of the statute was not made by the courts of law, and that the time of prescription for incorporeal rights remained as before (u). It is difficult to see upon what ground this distinction could have been made, as the enacting words of the two statutes are almost identical in expression, and the latter has been considered only as an addition to the former, restricting the period of prescription to sixty years before the action brought, and making no other alteration.

And, following out this doctrine, the Courts, upon the fixing of a shorter period of limitation in possessory actions, ought to have diminished the length of enjoyment, from which a prescriptive right might be inferred, in all like actions to the period of twenty years, fixed by statute 21 Jac. 1.

The opinion of Mr. Serjeant Williams, supported by high authority, seems to have been:—"That *an action on the case*, being a possessory action, was considered by the Courts to be in the nature of an ejectment; and as no one can recover in ejectment, unless he or those under whom he claims have been in possession within twenty years, or rather as an adverse uninterrupted possession by another for twenty years is a bar to an ejectment, so an uninterrupted possession of an easement for the same time is considered as a bar to an action on the case, which has for its object, in common with an ejectment, the object of the possession, or at least the dispossessing the defendant of it."—"From the case of *Holcroft v. Heel* (x) it seems necessarily to follow that

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(t) 2 Roll. Abr., tit. Prescription, Commissioners, p. 51.  
269, pl. 14.

(x) (1799), 1 Bos. & Pull. 400; *Stated*  
(u) 1st Report of Real Property 35 R. R. 683, and see 7 R. R. 462.



Before the  
Prescription  
Act.

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where a person has used and enjoyed an easement for twenty years and upwards, though it was a wrongful use at first, he thereby gains such a right that if he be disturbed in the enjoyment of it, he may maintain an action on the case for a disturbance; and it is no answer to show that the plaintiff originally obtained the use and possession of it by usurpation and wrong" (y).

There appears, therefore, some reason to doubt the correctness of the generally received opinion, that the equitable analogy above mentioned was not extended to the more recent statutes, 32 Hen. 8, and 21 Jac. 1, as well as to the earlier statute of Edw. 1. The only direct authority against this extension appears to be the opinion of Sir R. Brooke, as given in his reading on the statute of 32 Hen. 8, which is not stated to be founded on any decided case, while it is expressly laid down in Brooke's Abridgment, that 32 Hen. 8 "entirely repealed the ancient Statute of Limitations, and that it extended equally with the former statutes to copyholds as well as to freeholds; for the new statute is, that a man shall not make prescription, title, or claim, &c.; and those who claim by copy make prescription, title, and claim, &c.; also the plaints are in nature and form of a writ of our lord the king at common law, &c.; and those writs which have been brought at common law are ruled by the new limitation, and therefore the plaints of copyhold shall be of the same nature and form" (z).

In the case of *Bury v. Pope*, above cited, which was decided during the period which intervened between the passing of the two statutes of Hen. 8 and Jac. 1, sufficient time had not elapsed to confer a title by the former statute, even supposing the equitable analogy to have existed. *Whitton v. Crompton* (a), which appears to be the only case decided expressly upon the statute of 32 Hen. 8, and which is at the most but a doubtful authority, turned upon the point that a formedon, having been given since the passing of the Statute of Westminster, was not within the 32 Hen. 8, which was but a mere continuation of it; and ultimately the case appears to have been compromised.

The opinion of Mr. Serjeant Williams is in accordance with the expression of Lord Mansfield, "That an incorporeal right,

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(y) 2 Wms. Saund. 175 (n.); 2 Notes to Saund. 603.

(z) Tit. Limitations, pl. 2.  
(a) (1568), 3 Dyer, 278 a.

which, if existing, must be in constant use, ought to be decided by analogy to the Statute of Limitations" (b).

"The several Statutes of Limitations," said Abbott, C. J., "being all in *pari materia* ought to receive a uniform construction, notwithstanding any slight variation of phrase, the object and intention being the same" (c).

The view of Serjeant Williams, above cited, is however at variance with the generally received opinions upon this subject (d).

But, although the Courts refused in form to shorten the time of legal memory by analogy to the later Statutes of Limitation, they obviated the inconvenience which must have arisen from allowing long enjoyment to be defeated by showing that it had not had a uniform existence during the whole period required, by introducing a new kind of title by presumption of a grant made and lost in modern times (e).

And on this ground, although it appeared that a right of way had been extinguished by unity of possession (f), or even by an Act of Parliament (g), it has been held that a title might be obtained by an enjoyment for twenty years.

Before the  
Prescription  
Act.

Title by grant  
made and lost  
in modern  
times.

(b) 2 Evans' Pothier, 136.

(c) *Murray v. E. I. Co.* (1821), 5 B. & A. at p. 215; 24 R. R. 325; see also *Tolson v. Kaye* (1822), 6 Moore, C. P. 558; 23 R. R. 615, per Dallas, C. J.; [and the opinion of Lush, J., in *Angus v. Dalton* (1877), L. R. 3 Q. B. D. at p. 94; and compare the suggestions of Pollock, B., and Field and Manisty, JJ., in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at pp. 746, 753, 768.]

(d) [See e.g., *Angus v. Dalton* (1878), L. R. 4 Q. B. Div. at pp. 170 and 199, per Thesiger and Brett, L. JJ., and on appeal (1881), L. R. 6 App. Cas. at p. 778, per Fry, J.]

(e) The introduction of this doctrine was attempted by a modern civilian. *Laudensis*, says Merlin, p. 82, alleges that though a prescription is not admissible in support of a discontinuous servitude, usage will raise an inference of an actual grant, the existence of which is to be deduced from the patience of the adversary. "C'est bien là," says Merlin, "apprendre aux plaideurs et aux praticiens des chicanes dont ils ne sont que trop enclins à profiter."

[The earliest reported decision to this effect is that of *Lewis v. Price* in 1761; per Lord Blackburn in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 812.]

(f) *Keymer v. Summers*, cited in *Read v. Brookman* (1789), 3 T. R. 157; Bull. N. P. 74.

(g) *Campbell v. Wilson* (1803), 3 East, 294; 7 R. R. 462; see also *Mayor of Hull v. Horner* (1774), 1 Cowp. 102; *Eldridge v. Knott* (1774), Ibid. 214; *Holecroft v. Heel* (1799), 1 Bos. & Pul. 400; 35 R. R. 683; and see 7 R. R. 462; *Lady Dartmouth v. Roberts* (1812), 16 East, 334; *Livett v. Wilson* (1825), 3 Bing. 115; *Dodd, Fenwick v. Reed* (1821), 5 B. & Ald. 232; 24 R. R. 338; *Codling v. Johnson* (1829), 9 B. & C. 933; 33 R. R. 375.

[The case of *Campbell v. Wilson*, above referred to, in which it was held that the enjoyment of a way for twenty years was sufficient evidence from which to presume a grant or other lawful origin of a right of way, though an Act of Parliament had, prior to that enjoyment, extinguished a like right over the same land, so that the twenty years' enjoyment was in fact had by reason of the neglect of the owner of the servient tenement to avail himself of the provisions of the Act, is not at variance with the rule that a man cannot prescribe against a statute (Co. Lit. 115 a), a rule which holds good in the case of easements. The object of the statutory provision (an inclosure Act) in the case

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In a later case, where windows were shown to have existed twenty years, it was held that proof that they did not exist twenty-two years before the obstruction was insufficient to defeat an action (*h*).

This was in reality prescription shortened in analogy to the limitation of the 21 Jac. 1, and introduced into the law under a new name; for "the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed" (*i*).

[But the gist of the principle upon which a lost grant is

referred to was simply to benefit the owners of allotted lands, by exempting them from the burthen of existing rights of way, but not to injure the allottees by restricting the power of each allottee to dispose of or burthen his own land as he might think proper; and there was nothing in the statute prohibiting the creation of new rights. But where the acts of user relied upon are contrary to some statutory provision, so that an actual grant of the right which is sought to be established by user would be void, and it cannot possibly be referred to any legal origin, the common law rule prevails, and no right is acquired. *Rochdale Canal Co. v. Radcliffe* (1852), 18 Q. B. 287; 2 Sim. N. S. 78; 88 R. R. 687; *Race v. Ward* (1857), 7 E. & B. 384; *National Guayanteed Manure Co. v. Donald* (1859), 4 H. & N. 8; *Proprietors of Staffordshire and Worcestershire Canal Navigation v. Proprietors of Birmingham Canal Navigation* (1866), L. R. 1 H. L. 254, at pp. 267, 278; *Neaverson v. Peterborough Rural District Council*, [1902] 1 Ch. 557. Cf. *Traill v. McAllister* (1891), 25 L. R. Ir. 524, *Mews' Digest*, 1891, col. 120.

In the case of *Mill v. Commissioner in charge of the New Forest* (1856), 18 C. B. 60, a right of common over the lands of the Crown in the New Forest was claimed in respect of a piece of land which had formerly been part of the waste of the claimant's manor, but which had been inclosed in the year 1810, and afterwards occupied as a farm. The Court held that the user of turning cattle from this farm on to the Crown lands from the time of the inclosure down to the time of the claim, conferred no right, by reason that a statute, 9 & 10 Will. 3, c. 36, s. 10, prohibits the creation of any such right in the New Forest. It may occur to the reader that the claimant's predecessors may possibly

have had, before the passing of the statute last referred to, a right, in respect of the waste lands of the manor, of turning cattle on to the common lands of the Crown (in accordance with what was said by Bayley, J., in *The Earl of Sefton v. Court* (1826), 5 B. & C. 917, that a lord of a manor may have a right of turning out cattle on a common, in respect not only of his cultivated lands but also of his waste lands), and that the user subsequent to the inclosure was evidence of the existence of such a right in the claimant's predecessors, and that the user was not, therefore, necessarily illegal under the statute. This point, however, did not arise, as the claimant did not satisfy the commissioners who found the facts of the case that any right did exist before 1810, so that the possibility of a legal origin for the right claimed was excluded.

The judgments in *Codling v. Johnson* and *The Earl of Sefton v. Court* are both authorities that the mere fact of the tenement in respect of which a claim by prescription at common law is set up, being shown not to have formerly existed in the same state, is not conclusive against the claim.]

(*h*) *Penwarden v. Ching* (1829), Moo. & Mal. 400. [In *Philippis v. Halliday*, [1891] A. C. 228, a faculty for a pew was presumed after long possession.]

(*i*) 2 Black. Com. 265, citing *Potter v. North* (1680), 1 Ventris, 367. [The expedient "is ancillary to the doctrine of prescription at common law, and applicable in cases where something prevents the operation of the common law prescription from time immemorial, and is therefore only applicable when the right claimed is such as, if immemorial, might have been the subject of prescription." Per Lord Blackburn, in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 816.]

[presumed is that the state of affairs is otherwise unexplained. "When the Court finds an open and uninterrupted enjoyment of property for a long period unexplained, *omnia presumuntur rite esse acta*, and the Court will, if reasonably possible, find a lawful origin for the right in question" (k).] Modern lost grant.

The introduction of this doctrine was attended with considerable opposition; and it was contended that to sustain a claim founded upon such a lost grant, the jury must actually believe in its existence, or, at all events, they must find it as a fact, though they did not believe it (l).

The practical distinction was, that where the claim was by prescription, the length of enjoyment constituted a title; where, on the other hand, the right was claimed by "lost grant," the long enjoyment afforded but a presumption of title; and whether such presumption was conclusive for the purpose for which it was adduced was a point open to a certain degree of doubt.

Though the evidence of enjoyment, which has been already adverted to, was in theory presumptive evidence only of prescription, yet it was in practice and effect conclusive (m); and it is apprehended that if a jury had disregarded the recommendation of a judge "that such evidence warranted the presumption of a grant," the Court would have directed a new trial toties quoties (n).

But although this principle was clearly recognized in numerous decisions, yet doubts and difficulties still arose from the vague and uncertain language frequently made use of by judges in leaving these questions to the jury—enjoyment being sometimes treated as affording a conclusive presumption, whilst at others such user was only considered to be "cogent evidence" of prescription (o), the presumption of which judges were in the habit of recommending juries to adopt.

"It has not unfrequently happened," says a modern writer, "that the same presumption has been spoken of by some judges as a rule of law, whilst by others it has been treated merely as

(k) *Att.-Gen. v. Simpson*, [1901] 2 Ch. 671, per Farwell, J., at p. 698; and see *Tyne Improvement Commissioners v. Imrie* (1899), 81 L. T. 174. Cf. *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188.

(l) 2 Evans' Pothier, 136.

(m) See per Parke, B., in *Bright v. Walker* (1834), 1 C. M. & R. at p. 217; 40 B. R. 536; Preface VI.

(n) See per Alderson, B., in *Jenkins v. Harvey* (1835), 1 C. M. & R. 895; 40 B. R. 769.

(o) *Rex v. Jolliffe* (1823), 2 B. & C. 54; 26 B. R. 264. [See Best on Presumptions, p. 103; and per Bowen, J., in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 781: "The twenty years' rule . . . in truth was nothing but a canon of evidence."]

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fit to be recommended to a jury, or as one which a jury might properly make" (p).

[In the modern case of *Dalton v. Angus* (q), where the subject was fully considered, all the judges appear to have been of opinion that the presumption was capable of being rebutted by some means or other (r); but they differed upon the question, what evidence or admission was sufficient for the purpose.

The plaintiffs had proved enjoyment of the support claimed for their factory since its erection twenty-seven years before the accident which gave rise to the action, and claimed the right under the doctrine of lost grant; but it was either proved or admitted at the trial that no grant had ever in fact been made. Notwithstanding this admission, Lush, J., at the trial directed a verdict for the plaintiffs; and, on the motion for judgment, he adhered to his opinion, "that the mere absence of assent, or even the express dissent of the adjoining owner, would not prevent the right to light and support from being acquired by uninterrupted enjoyment, and that nothing short of an agreement, either express or to be implied from payment or other acknowledgment, that the adjoining owner shall not be prejudiced by abstaining from the exercise of his right, would suffice to rebut the presumption; in other words, that it would be presumed, after the lapse of twenty years, that the easement had been enjoyed by virtue of some grant or agreement, unless it were proved that it had been enjoyed by sufferance" (s). Cockburn, C. J., on the contrary, held that, when it was proved or admitted that the assent of the defendant's predecessor was not asked for or obtained, by grant or in any other way, to any support being derived from the soil, the presumption was at an end (t). He was also of opinion that,

(p) 1 Phillips and Arnold on Evidence, ed. 10, p. 470.

(q) (1877 to 1881), L. R. 3 Q. B. D. 85; 4 Q. B. Div. 162; 6 App. Cas. 740. This case is now a leading authority upon several branches of the law of easements, and notably upon the following points, each of which is dealt with in its place: (1) the presumption of lost grant and the evidence admissible to rebut it; (2) the position of negative easements under Lord Tenterden's Act (below, p. 202, note (l)); (3) secrecy or uncertainty of enjoyment (pp. 231, 236); (4) the effect of an enjoyment which it is impossible or difficult to interrupt

(p. 236); (5) the characteristics of the easement of support generally (Part III. Chap. IV.); and (6) the liability of an employer for the acts of his contractor (Part VI. Chap. II.). The several aspects of the case are considered in the several passages where these subjects respectively come up for treatment.

(r) See especially the cases collected by Cockburn, C. J., L. R. 3 Q. B. D. pp. 106, ff.; and the observations of Brett, L. J., on appeal, 4 Q. B. Div. at p. 200.

(s) L. R. 3 Q. B. D. at p. 93.

(t) L. R. 3 Q. B. D. at pp. 117, 120.

[the enjoyment of the support claimed not being capable of being interrupted, no grant could be implied from the failure to interrupt it (*u*). Mellor, J., agreed on both points with Cockburn, C. J., and judgment was given for the defendants.

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The Court of Appeal was also divided upon the question now under consideration. Brett, L. J., considered that the question of grant or no grant was a pure question of fact to be found by the jury, and that to exclude evidence tending to show that there never was a grant would be to usurp the functions of the legislature (*x*); quoting the observation of Lord Mansfield, in *The Mayor of Hull v. Horner* (*y*), that "length of time, used merely by way of evidence, may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other according to circumstances." Thesiger, L. J., while holding that the presumption of lost grant might be negatived by showing "a legal incompetence as regards the owner of the servient tenement to grant an easement (*z*), or a physical incapacity of being obstructed as regards the easement itself (*a*), or an uncertainty and secrecy of enjoyment putting it out of the category of all known easements" (*b*), was of opinion that the presumption could not be rebutted by mere proof that no grant had in fact been made: "The presumption of acquiescence," he said, "and the fiction of an agreement or grant deduced therefrom, in a case where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct" (*c*). Cotton, L. J., agreed with Thesiger, L. J. (*d*). In the result, the Court directed that the defendants should elect within fourteen days whether they would take a new trial, which the Court thought them entitled to upon the point of notice (*e*), and

(*u*) See this point considered below, p. 236.

(*x*) L. R. 4 Q. B. Div. at p. 201. Compare the expressions of opinion by the same learned judge in *Duke of Norfolk v. Arbutnot* (1880), L. R. 5 C. P. Div. at p. 393, and in *Earl de la Warr v. Miles* (1881), L. R. 17 Ch. Div. at p. 690.

(*y*) (1774), Cowp. 102.

(*z*) See *Barker v. Richardson* (1821), 4

B. & Ald. 579; 23 R. R. 400; and above, p. 191, note (*g*).

(*a*) See *Webb v. Bird* (1863), 13 C. B. N. S. 841; and the cases considered below, p. 236.

(*b*) See *Chasemore v. Richards* (1859), 7 H. L. C. 349; and below, p. 285.

(*c*) L. R. 4 Q. B. Div. p. 173.

(*d*) Ibid. p. 186.

(*e*) See below, p. 231.

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[that, if they did not so elect, judgment should be entered for the plaintiff.

The defendants did not elect to take a new trial, but appealed to the House of Lords (*f*), where the case was twice argued by counsel for the appellants and for the respondents, and questions were put to seven judges of the High Court. Of the judges, three (*g*) based their opinions upon grounds which rendered it unnecessary for them to consider in what manner the presumption of lost grant might be rebutted; three (*h*) in effect agreed with Thesiger and Cotton, L. JJ., that the presumption could not be rebutted merely by showing that no grant had in fact been made; while the seventh (*i*) was of opinion that proof by the defendants that the right claimed had not been granted either by deed or by equitable agreement was sufficient to rebut the presumption.

The opposite points of view of the four last-named judges on this question are fully expressed in the opinions of Lindley and Bowen, JJ., respectively.

"The theory of implied grant," said Lindley, J., "was invented as a means to an end. It afforded a technical common law reason for not disturbing a long-continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested, the presumption in favour of its legality ought to be made" (*k*).

Bowen, J., on the other hand, treated the rule as to presuming a grant or agreement from twenty years' enjoyment as nothing more than a canon of evidence, similar to the presumption of death arising from seven years' absence without news received, or to the presumption of the satisfaction of a bond after twenty years, and similarly liable to be displaced by counter-evidence. "It seems a contradiction in terms to maintain that the rebuttable presumption of the existence of a grant would not at any time have been necessarily counteracted by actual proof that no such grant had ever been made. . . . But . . . it would not now

(*f*) L. R. 6 App. Cas. 740.

(*g*) Pollock, B., and Field and Manisty, JJ.; see the effect of their opinions given below, Part III. Chap. IV.

(*h*) Lindley, Lopes, and Fry, JJ., the

last-named bowing to authority, but questioning the principle of the decided cases.

(*i*) Bowen, J.

(*k*) At p. 765.

[be sufficient to disprove a legal origin, unless the possibility of an equitable origin were negatived as well" (*l*).]

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Lindley and Lopes, JJ., agreed with Bowen, J., that the question of notice should have been submitted to the jury; but, the defendant having rejected a new trial, this was now immaterial to the particular case (*m*).

The House (*n*), after hearing the judges, unanimously affirmed the decision of the Court of Appeal, Lord Penzance alone questioning the principle, but following the previous decisions. Lord Blackburn appears to have proceeded on the grounds which influenced Pollock, B., and Field and Manisty, JJ., looking upon the right claimed as springing directly from the long enjoyment, without the interposition of a grant inferred or imputed; and he did not therefore consider the question here discussed. Lord Selborne, while expressing an opinion that the right claimed was conferred by the Prescription Act (*o*), thought that the same result could be reached by the doctrine of presumed grant, and expressed his concurrence with the majority of the Court of Appeal (*p*). Lord Watson in effect agreed with Lord Selborne.

The effect of the decision is effectually to establish the rule that an easement of support for new buildings may be acquired by twenty years' open and uninterrupted user; and although the Lords do not expressly discuss the general question as to what evidence is admissible to rebut the presumption of lost grant, the effect of their judgment is to affirm the opinion of Thesiger and Cotton, L. JJ. It follows that the presumption cannot be displaced by merely showing that no grant was in fact made; the long enjoyment either estops the servient owner from relying on such evidence or overrides it when given (*q*), and the Court will make any possible presumption necessary to give that long enjoyment a legal origin (*r*). But it appears to be still law that an incapacity to grant the easement, extending over the whole time in the course of which the right (if granted at all) must have been granted, will rebut the presumption in question and negative

(*l*) See pp. 779 to 781 of the report.

(*m*) On this point, see below, p. 231.

(*n*) Lord Selborne, C., and Lords Penzance, Blackburn, and Watson.

(*o*) See below, p. 202, note (*l*).

(*p*) L. R. 6 App. Cas. at p. 800.

(*q*) Cf. *Goodman v. Mayor of Saltash* (1882), L. R. 7 A. C. 633; *Davey v.*

*Gregory* (1890), L. R. 25 Q. B. D. 481; *Philipp v. Halliday*, [1891] A. C. 228. Dist. *Tilbury v. Silva* (1890), L. R. 45 Ch. D. 18.

(*r*) *Att.-Gen. v. Simpson*, [1901] 2 Ch. 638; *East Stonehouse Urban Council v. Willoughby Bros., Ltd.*, [1902] 2 K. B. 332; *Dawson v. McGroggan*, [1903] 1 Ir. R. 98.



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[the claim so far as it rests on the fiction of a lost grant (s). And it is clear that the claim may be resisted on any ground which would prevent the right from being acquired by prescription from time immemorial (t).]

Objections to  
the doctrine  
of lost grant.

This mode of carrying out the policy of the law, by the intervention of a jury, has been strongly objected to. A distinguished writer has observed :—

“The practice of requiring juries in any case to be mere passive instruments in finding facts upon their oaths, in the existence of which the Court itself did not believe, although now established, is of singular origin. The effect is indirectly to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems very difficult to say why such presumptions should not at once have been established as mere presumptions of law to be applied to the facts by the Courts, without the aid of a jury. That course would certainly have been more simple; and any objection as to the want of authority would apply with equal, if not superior, force to the establishing such presumptions indirectly through the medium of a jury” (u).

“Notwithstanding the admission of the presumptions,” says the same learned author, “which appear now to be established and necessary rules of law, this branch of jurisprudence cannot but be considered as imperfect and inartificial, more especially if it be contrasted with the laboured distinctions of the Roman law upon the same subject. The presumption being one of law, arising out of the fact of continued and adverse possession unrebutted, ought, as a rule of law, to be applied whenever the facts to which it is applicable arise; and yet, unless the jury strain their consciences so far as to find a grant, in the actual existence of which the Court itself may not believe, the rule of law is inapplicable; in other words, the rule is useless unless the jury, upon the recommendation of the Court, find a fact which, in all human possibility, never

(s) See the opinion of Thesiger, L. J., above, at p. 195, and the cases there quoted: *Tyne Improvement Commissioners v. Imrie* (1899), 81 L. T. 124; *Neaverson v. Peterborough Rural District Council*, [1902] 1 Ch. 557; and cf. *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48. As to the effect of incapacity to grant an easement

upon a claim under the Act, see *Lemaitre v. Davis* (1881), L. R. 19 Ch. D. at p. 291.

(t) See e.g., *Roberts v. James* (1903), 89 L. T. 282; cf. *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188.

(u) 2 Stark. on Evid. 2nd ed. 675.

existed, and which is perfectly unconnected with the real merits of the case; surely, so heavy a tax upon the consciences and good sense of juries, which they are called on to incur for the sake of administering substantial justice, ought to be removed by the assistance of the legislature" (x).

Objections to the doctrine of lost grant.

The stat. 2 & 3 Will. 4, c. 71 (commonly called the Prescription Act), "was intended," said Baron Parke, "to accomplish this object by shortening in effect the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury" (y).

The Prescription Act.

This Act, however, contains enactments much more extensive than would be necessary for the attainment of this object merely; and it certainly is to be lamented that its provisions were not more carefully framed, and that a more comprehensive view was not taken of the whole of this most important branch of our law. It deserves to share, in common with too many of our statutes, in the reproach that it is couched in terms so obscure, and that many of the clauses are so carelessly drawn, that it is extremely difficult to understand what was the intention of the legislature.

It is of the utmost importance to ascertain what the law really was upon the subject of titles by prescription at the time of passing the statute, as the statute, although it has given some increased facilities to a party claiming an easement, has not superseded the common law, but allowed him an election to proceed either under the statute or according to the common law, or both (z).

The statute has not superseded the Common Law.

Nor is the title by lost grant put an end to by the statute any more than that the title by prescription is abrogated by it (a); indeed, as far as the preamble may be permitted to afford an indica-

(x) Ibid. 669; [and see *Dawson v. M'Grogan*, [1903] 1 Ir. R. 92, at p. 98.]

(y) *Bright v. Walker* (1834), 1 Cr. M. & Ros. at p. 218; 40 R. R. 536; Preface VI.; [and per Cockburn, C. J., in *Angus v. Dalton* (1877), L. R. 3 Q. B. D. at p. 105; and Lord Macnaghten in *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. at p. 236.]

(z) ["The statute only applies where you want to stand upon thirty years' user; but here, where the title is one of 200 or 300 years, that statute is not needed, and the title can be rested on the original right before the passing of the statute." (*Warrick v. Queen's College, Oxford* (1871), L. R. 6 Ch. 728;

*Aynsley v. Glover* (1876), L. R. 10 Ch. 283.) But this statement must be taken subject to the opinion expressed by Farwell, L. J., in *Hyman v. Van den Bergh*, [1908] 1 Ch. 167, 176, that in a case in which either of the statutory defences (viz., enjoyment under a written agreement, or interruption for more than a year) is available to the alleged servient owner, the alleged dominant owner cannot evade the statutory provisions by setting up a claim outside the Act.]

(a) [*Leconfield v. Lonsdale* (1870), L. R. 5 C. P. 657, 726; and Lord Blackburn's observations in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 814; and see last note.]

The statute  
has not  
superseded  
the Common  
Law.

tion of the objects of the statute, it would seem that the principal motive for passing the statute was in order to obviate the difficulty which arose from showing the actual commencement of an enjoyment within the time of legal memory.

Preamble.

The statute (2 & 3 Will. 4, c. 71) is as follows:—"An Act for shortening the Time of Prescription in certain Cases.—Whereas the expression 'Time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant (*b*), to any right of common or other profit or benefit (*c*) to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person (*d*), or body corporate (except such matters and things as are herein specially provided for, and except tithes, rent, and services) shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto (*e*) without

Claims to  
right of com-  
mon and other  
profits à  
prendre not  
to be defeated  
after thirty  
years' enjoy-  
ment by show-  
ing [only] the  
commence-  
ment;

(*b*) [The judgment in *Carlyon v. Locering* (1857), 1 H. & N. 784, shows that the extent of the right claimed by user is not material, if the right could have been legally granted; and see *Dawson v. M'Grogan*, [1903] 1 Ir. R. 92. But a claim for a common without stint cannot be made at the common law, and cannot therefore be supported under this Act by evidence of user (*Morley v. Clifford* (1882), L. R. 20 Ch. D. 753; cf. *Earl de la Warr v. Miles* (1881), L. R. 17 Ch. Div. 535); and see as to claims by custom or otherwise, to rights in gross, post, p. 207, note (*g*).]

(*c*) [Quere, whether this extends to an assignable right to hawk, hunt, fish, and fowl; see *Wickham v. Hawker* (1840), 7 M. & W. 63; 56 R. R. 623. It seems to include a fishing weir: see *Rolle v. Whyte* (1868), L. R. 3 Q. B. 286; and *Leconfield v. Lonsdale* (1870), L. R. 5 C. P. 657.

The Act only affects rights, not

duties: see Williams, J., in *Peter v. Daniel* (1848), 5 C. B. at p. 573.]

(*d*) [The first section applies only to cases where one man claims by custom, prescription, or grant, some profit or benefit to be taken or enjoyed from or upon the land of another, and has no application to a right claimed by a copyholder on his own tenement according to the custom of the manor (*Hanner v. Chance* (1865), 11 Jur. N. S. 397; 34 L. J. Ch. 413).]

(*e*) [I.e., claiming right thereto as an easement and as of right: see *Harbidge v. Warwick* (1819), 3 Exch. 552; 77 R. R. 725; *Gared v. Martyn* (1865), 19 C. B. N. S. 732; *Chamber Colliery Co. v. Hopwood* (1886), L. R. 32 Ch. Div. 649; *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229. Provided the enjoyment be as of right, it is immaterial whether it is had under the proper claim of right: *Earl de la Warr v. Miles* (1881), L. R. 17 Ch. Div. 535;

interruption (*f*) for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit, was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible (*g*), unless it shall appear that the same was taken and enjoyed by some consent or agreement (*h*) expressly made or given for that purpose by deed or writing (*i*).

2 & 3 Will. 4,  
c. 71.  
  
after sixty  
years' enjoy-  
ment the  
right to be  
absolute,  
unless had by  
consent or  
agreement in  
writing.

and see *Dawson v. McGrogan*, [1903] 1 Ir. R. 92, where a lost grant was presumed, the enjoyment having been had under rights erroneously believed to exist under a lease.

But the right acquired under the Act can only be co-extensive with the actual user: *Hammerton v. Honey* (1876), 24 W. R. 603; and per Brett and Cotton, L. J.J., L. R. 17 Ch. Div. at pp. 594, 598.]

(*f*) [See the notes to sect. 4, below, p. 205.]

(*g*) [As to this expression, see p. 203, note (*o*).]

(*h*) [The agreement need not necessarily be signed by the servient owner: see *Bewley v. Atkinson* (1879), L. R. 13 Ch. Div. 283; and signature by a tenant has been held sufficient (*Hyman v. Van den Bergh*, [1907] 2 Ch. 516; on appeal, [1908] 1 Ch. 167). As to what amounts to an agreement, see below, p. 205, note (*z*).] As to what is constructive notice of the agreement to a purchaser of the servient property, see *Allen v. Seckham* (1879), L. R. 11 Ch. Div. 790.]

(*i*) [The provisions of the first section as to profits à prendre differ only from those of the second as to easements, in respect of the length of the periods of user required, and the principles of the decisions on one section are in almost every case applicable to the other.

These sections make no change in the common law, 1st, as to the nature or extent of the rights which can be claimed as profits à prendre, or as easements; or, 2ndly, as to the requisite qualities of the user by which they can be acquired, viz., that it must be "nec vi nec clam nec precario" (with a single exception noticed below); or, 3rdly, as

to the admissibility of facts showing that the enjoyment could not possibly have been as of right, as ex. gr. where it is shown that the right, if any, must have originated at a certain time, when and since which the new acquisition of such right was prohibited by law, either in respect of the lands over which, or the persons by whom the right is claimed; or, 4thly, in so far as the shorter periods mentioned in both sections are concerned, in the admissibility of any evidence whatever, except mere proof of the time of the origin of the enjoyment, by which a claim at the common law might have been defeated, as, for instance, a licence written or parol extending over the whole period, or the absence and ignorance of the persons interested in opposing the claim, and their agents, during the whole period. But in the case of the enjoyment for the longer periods, all such evidence as that included in the 4th head would be excluded and the claim, if not open to the objections arising under the 1st, 2nd, or 3rd heads, would be indefeasible except by proof that the enjoyment was held under a written consent or agreement made or given for the purpose.

The exception above mentioned as to the qualities of the user, introduced by the statute, is that of the case in which a right can be acquired under the Act by a precarious user. That is the case of an enjoyment for either of the longer periods under a parol licence extended over the whole period and not renewed during it. In this one, and almost impossible instance, a right may be acquired under the Act by an enjoyment which would at the common law have been bad as precarious; this is fully explained in the judgment in *Tickle v. Brown* (1836), 4 A. & E. 369, and re-

2 & 3 Will. 4,  
c. 71.

In claims of  
right of way  
or other ease-  
ment the  
periods to be  
twenty years  
and forty  
years.

"Sect. 2. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant (k), to any way or other easement (l), or to any water-

results from the provisions of sects. 1 and 2, that an enjoyment for the longer periods shall only be defeated by proof of a written licence or agreement, which involves the consequence that an enjoyment may, in this instance, be as of right, though permissive, unless the claimant, by asking for permission during the period, admits that he then has no right, and so breaks the continuity of the enjoyment for the whole period (*Gardner v. Hodgson's Kingston Brewery Co., Ltd.*, [1903] A. C. 229, affirming [1901] 2 Ch. 198).

The practical result is, that in the case of the shorter periods, any point whatever which might have been taken at the common law against a claim by prescription or grant, may be taken against a claim under sect. 1 or 2 of the Act, except one, i.e., that the right originated within the time of legal memory; and, in case of the longer periods, any objection arising from the nature or extent of the rights claimed, from defects in the quality of the user (except the one already pointed out), or from facts showing that the right claimed, though not objectionable on either of those grounds, is bad in consequence of some prohibition applicable to the particular case, may still be taken.

Moreover, the decisions subsequently referred to show that, in order to make out a case under the statute, under either the first or second section, and both as to the longer and shorter periods, the claimant is exposed to certain difficulties which did not exist at common law.

They are as follows:—

1. The user must be proved for the period computed next before the commencement of the suit or action in which the claim is contested. (Sect. 4.)

2. There must be nothing in the facts inconsistent with the continuous enjoyment of the profit à prendre or easement as such during the whole period; e.g., unity of actual possession at any time during the period would be fatal to any claim under the Act, however small the interest of the person exercising the alleged right may have been in the land upon which it was exercised. At the common law, unity of possession was only fatal to a claim by prescription where the possession proved was of an estate equal in duration to the right claimed, whereas under the Prescription

Act, any unity of actual possession, though the alleged dominant and servient tenements are held under different landlords, is fatal to the proof of a case under that Act. (See the note at p. 186.)

3. The right acquired is measured by the user, and can be only co-extensive with it; for example, in a claim of common by immemorial prescription, at the common law, the fact that a house obstructing the exercise of the right on its site had stood on the common for two or three years before the suit, would not have prevented the proof of the right to the use of the entire common, including the site of the house; but under Lord Tenterden's Act the right acquired would only be co-extensive with the user, and the site of the house would be excluded. See *Davies v. Williams* (1851), 16 Q. B. 546; 83 R. R. 592, and the dictum of Cresswell, J., in *Moore v. Webb* (1857), 1 C. B., N. S. 676, as to the application of this to easements. And see per Lord Robertson in *Pirie v. Kintore (Earl)*, [1906] A. C. 478, at p. 481.]

(k) See p. 200, note (b).

(l) [This section does not apply to the easement of light, which is separately dealt with by sect. 3; *Perry v. James*, [1891] 1 Ch. 658; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48. But it is not confined (as suggested by Erle, C. J., in *Webb v. Bird* (1861), 10 C. B., N. S. 268; 13 C. B., N. S. 311) to rights of way and water: *Dalton v. Angus* (1881), L. R. 6 H. L. at p. 793, per Lord Selborne; *Bass v. Gregory* (1890), L. R. 25 Q. B. D. 481; *Simpson v. Godmanchester Corporation*, L. R. (1897), H. L. 699. In *Dalton v. Angus*, it appears to have been the general view that the section applied only to affirmative easements; but the question was raised whether the right of support to buildings was affirmative or negative. (See *Lemaître v. Davis* (1881), L. R. 19 Ch. D. 681, and below, Part III. Chap. IV.)

It would seem that a pew is not within this section, as the owner of the freehold has no power to grant the use of a pew. See Best on Presumptions, p. 100; *Crisp v. Martin* (1876), L. R. 2 Pr. D. 15; *Philipps v. Halliday*, [1891] A. C. 228; *Stileman-Gibbard v. Wilkinson*, [1897] 1 Q. B. 749.]

course or the use of any water (*m*), to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption (*n*) for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter, as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (*o*).

(*m*) [Claim of right to adulterate the water of a natural stream is a claim of a "watercourse" within this section. *Wright v. Williams* (1836), 1 M. & W. 77; 46 R. R. 265; *Carlyon v. Lovering* (1867), 1 H. & N. 784, 797. A claim to waste water escaping from a lock is not a claim of a watercourse (*Staffordshire and Worcestershire Canal v. Birmingham Canal* (1866), L. R. 1 H. L. 254); nor is water percolating through the banks of a river. *Roberts v. Fellowses* (1906), 94 L. T. 279. A claim of right to go upon another man's close, and take water out of a spring there, is an easement.]

(*n*) [See p. 200, note (*c*), and the notes to sect. 4.]

(*o*) [See, as to this consent, p. 201, note (*h*), and, upon the whole section, p. 201, note (*g*).

The right only becomes absolute and indefeasible if it has been enjoyed as of right; and therefore enjoyment, even for the period of forty years, by a tenant, of an easement, such as a right of way, over land in the occupation of another tenant holding under the same landlord, cannot confer an easement under this section. *Kilgour v. Gaddes*, [1904] 1 K. B. 457, overruling the dictum of Chitty, J., in *Harris v. De Pinna* (1835-6), 33 Ch. D. 238; and see *Damper v. Bassett*, [1901] 2 Ch. 350.

In *Hanna v. Pollock*, [1900] 2 Ir. R. 664, the question as to whether an easement could be acquired under the

Prescription Act by less than forty years' enjoyment by one tenant, against property in the occupation of another tenant of the same landlord, received consideration; *FitzGibbon, L. J.*, expressed his opinion that less than forty years' enjoyment by a termor against a termor could not, under sect. 2 of the Act, confer an easement or raise any presumption of a lost grant, but it appears to have been the opinion of the learned Lord Justice that an easement could be acquired absolutely and indefeasibly by forty years' enjoyment; *Walker, L. J.*, was of opinion "that a lost grant of a right to water, or a right of way, may still be presumed from enjoyment of twenty years between two tenants, whether holding under the same landlord or not"; and *Holmes, L. J.*, held the same opinion. The case was, however, decided on the facts (see per *FitzGibbon, L. J.*, at p. 673), and the question is decided, at any rate so far as the English Courts are concerned, by *Kilgour v. Gaddes* (ubi sup.).

In circumstances similar to those in *Kilgour v. Gaddes* (ubi sup.), a profit à prendre could not, for the same reasons as were the grounds of the decision in that case, be acquired under sect. 1 of the Act; *secus* in the case of light, under sect. 3. *Fear v. Morgan*, [1906] 2 Ch. 406; *affd. sub nom. Morgan v. Fear* (1907), W. N. 196; and cf. *Richardson v. Graham*, [1908] 1 K. B. 39.]

2 & 3 Will. 4,  
c. 71.

Claim to the  
use of light  
enjoyed for  
twenty years  
indefeasible,  
unless shown  
to have been  
by consent or  
agreement in  
writing.

"Sect. 3. And be it further enacted (*p*), That when the access (*q*) and use of light to and for any dwelling-house, workshop, or other building (*r*), shall have been actually enjoyed therewith (*s*) for the full period of twenty years without interruption (*t*), the right thereto (*u*) shall be deemed absolute and indefeasible (*x*), any local usage or custom to the contrary notwithstanding (*y*), unless

(*p*) [The Crown, not being named in this section, is not bound by it. *Perry v. Eames*, [1891] 1 Ch. 658; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48.]

(*q*) [I.e., the access or freedom of passage over the servient tenement, as defined by the aperture in the dominant tenement. See *Scott v. Pape* (1886), L. R. 31 Ch. Div. 554; *Harris v. De Pinna* (1886), L. R. 33 Ch. Div. 238; *Aldin v. Latimer Clark & Co.*, [1894] 2 Ch. 437.]

(*r*) [As to what is a "building" within the meaning of this section, see *Duke of Norfolk v. Arbuthnot* (1880), L. R. 5 C. P. Div. 390; *Harris v. De Pinna*, *ubi sup*; *Clifford v. Holt*, [1899] 1 Ch. 698; *Maberley v. Dowson*, above, p. 21, was decided before the Act.

(*s*) "Sect. 2 requires that the easements there mentioned shall have been enjoyed by persons 'claiming right thereto';" but in sect. 3, which relates to the access of light, there is no such expression, and I think the omission is made purposely;" per Maule, B., in *Flight v. Thomas* (1840), 11 Ad. & E. 695; 52 R. R. 468. Cf. *Mayor of London v. Peuterers' Co.* (1842), 2 Moo. & Rob. 409; 62 R. R. 816; *Frewen v. Philipps* (1861), 11 C. B., N. S. 449; *Simper v. Foley* (1862), 2 J. & H. 555.

But the access of light must be enjoyed as an easement; [and therefore an enjoyment while the dominant and servient tenement are in the same occupation will not do; *Harbidge v. Warwick* (1849), 3 Exch. 552; 77 R. R. 725; *Ladyman v. Grate* (1871), L. R. 6 Ch. 763.

The period of enjoyment begins as soon as the windows are put in the dominant house, capable of being opened and shut and of admitting light. It is not necessary that the house should be occupied, or that the light should have been continuously admitted. *Courtauld v. Legh* (1869), L. R. 4 Exch. 126; *Cooper v. Straker* (1888), L. R. 40 Ch. D. 21; *Collis v. Laugher*, [1894] 3 Ch. 659.

The question whether there has been an actual enjoyment is a question of fact to be determined according to the circumstances of each case (*Smith v.*

*Baxter*, [1900] 2 Ch. 138); and an alteration in the dominant building which would not involve the loss of a right to light when indefeasibly acquired (as to which see post, pp. 28, 546, 549) will not prevent the acquisition of the right if made during the statutory period in which the right is in course of acquisition. (*Smith v. Baxter*, [1900] 2 Ch. 138; *Andrews v. Waite*, [1907] 2 Ch. 500.)

(*t*) [See notes to sect. 4. The term interruption in this section bears the same meaning as in sect. 4, and refers to an adverse obstruction, and not to a mere discontinuance of user. *Smith v. Baxter*, [1900] 2 Ch. 138.]

(*u*) [I.e., the right to an easement of light; as to which see *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179; *Ambler v. Gordon*, [1905] 1 K. B. 417; and see below, Part V. Chap. II.]

(*x*) [The right exists not only during the continuance of the interest of the person by whom the enjoyment was had, but as an easement attached to the fee simple of the dominant tenement. *Bright v. Walker* (1834), 1 C. M. & R. 211; 40 R. R. 536, Preface VI.; *Robson v. Edwards*, [1893] 2 Ch. 146; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48, 65. And the right can be acquired by one tenant against another holding adjoining premises under the same landlord; and when so acquired, absolutely and indefeasibly, by twenty years' enjoyment, the right enures in favour of the dominant tenement, not only as against the tenant of the adjoining premises, but as against the common landlord and all succeeding owners of the adjoining premises. *Frewen v. Philipps* (1861), 11 C. B., N. S. 449; *Harris v. de Pinna* (1886), L. R. 33 Ch. D. 238; *Robson v. Edwards*, [1893] 2 Ch. 146; *Fear v. Morgan*, [1906] 2 Ch. 406; *affd. sub nom. Morgan v. Fear* (1907), W. N. 196. In the head-note to *Frewen v. Philipps* the concluding words "as against the other" should be omitted.]

(*y*) [*Cooper v. Hubbuck* (1862), 12 C. B., N. S. 456; *Tinscott v. Merchant Tylors' Co.* (1856), *ubi sup*. The statute has not altered the law as to the nature

it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (z). 2 & 3 Will. 4, c. 71.

"Sect. 4. And be it further enacted (a), That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question (b), and that no

Before mentioned periods to be deemed those next before some suit wherein a claim to which such periods relate shall be brought into question.

and extent of light to which the dominant tenement is entitled. *Kelk v. Pearson* (1871). L. R. 6 Ch. 809.]

(z) [See p. 201, note (h). Where a lessor granted a lease of a house with the legal and reputed appurtenances, "except rights, if any, restricting the free use of adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise," it was held that these words, although sufficient to negative the implied grant of light (above, p. 115), were not a "consent or agreement" within this section so as to prevent the statute from running as from the date of the grant. *Mitchell v. Cantrill* (1887), L. R. 37 Ch. Div. 56; dist. *Haynes v. King*, [1893] 3 Ch. 439.

An agreement referring to "windows" was held to include a skylight. *Easton v. Jsted*, [1903] 1 Ch. 405. But a stone built into the wall of a house, and having inscribed upon it: "1816. This stone is placed by J. A. to perpetuate R. M.'s right to build within 9 inches of this and any other building," was held not to be a "consent or agreement expressly made or given for that purpose." *Ruscoe v. Grounsell* (1903), 69 L. T. 426. The grounds of this decision appear, from the judgment of Halsbury, L. C., to have been that the inscription did not unequivocally refer to light, but might have been placed in position for the purpose of preserving the boundary, or for some other reason.

In *Hyman v. Van den Bergh*, [1907] 2 Ch. 516; affd. [1908] 1 Ch. 167, it was held by Parker, J., that an agreement made and signed only by the tenant of the tenement in respect of which the right was claimed, was a sufficient agreement in writing within the meaning of the section, notwithstanding the fact that before the agreement was signed by the tenant enjoyment had been had for over twenty years immediately preceding;

and on appeal, this decision was affirmed (W. N. (1907), p. 250).

(a) Note the qualification of this section by sect. 7.

(b) [The right must be laid twenty years before the commencement of the suit and not before the injury complained of: *Wright v. Williams* (1836), 1 M. & W. 77; 46 R. R. 265; *Richards v. Fry* (1838), 7 A. & E. 698; 45 R. R. 816; *Flight v. Thomas* (1841), 8 Cl. & Fin. 242, per Lord Cottenham; 54 R. R. 55; *Tilbury v. Silra* (1890), L. R. 45 Ch. Div. 98; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, per Lord Macnaghten, at p. 189; *Hyman v. Van den Bergh*, [1907] 2 Ch. 516; affd. [1908] 1 Ch. 167. But an enjoyment next before any action or suit in which the claim is brought into question confers a right which may be set up in every subsequent action and suit: *Cooper v. Hubbuck* (1862), 12 C. B., N. S. 456, Williams, J., diss.

It had been held or hinted, that in order to support the plea of enjoyment during the period, actual user must be proved in the first and in the last years of the period relied upon (see *Carr v. Foster* (1842), 3 Q. B. 581; 11 L. J. Q. B. 284; *Bailey v. Appleyard* (1838), 8 A. & E. 161; 47 R. R. 537; *Parker v. Mitchell* (1840), 11 A. & E. 788). And in *Lowe v. Carpenter* (1851), 6 Exch. 826; 20 L. J. Exch. 374; 86 R. R. 495, it was also suggested by Parke, B., that an act of user in every year of the period should be shown to have taken place. But in *Hollins v. Verney* (1884), L. R. 13 Q. B. Div. 304, the Court of Appeal declined to recognize any such rule, and held the true rule to be that "a cessation of user which excludes an inference of actual enjoyment as of right for the statutory period will be fatal at whatsoever portion of the period the cessation occurs, and, on the other hand, a cessation of user which does not exclude such inference is not fatal, even



2 & 3 Will. 4, c. 71. act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year (c), after the party interrupted (d) shall have had or shall have notice thereof, and of the person making or authorizing the same to be made (e).

In actions on the case the claimant may allege his right generally, as at present.

In pleas to trespass and other pleadings, where

"Sect. 5. And be it further enacted, That in all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this Act mentioned and provided which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this Act, it would have been necessary to allege

although it occurs at the beginning, or the end, of the period." In the case itself, the user had been so rare as not to raise an inference of continuous and open enjoyment during the statutory period; and in *Smith v. Baxter*, [1900] 2 Ch. 138, it was laid down that the question of enjoyment is in every case a question of fact to be determined according to the circumstances. Cf. per James, L. J., in *Earl de la Warr v. Miles* (1881), L. R. 17 Ch. Div. at p. 600; and see *Lawson v. Langley* (1836), 4 A. & E. 890; 43 R. R. 513.

It seems impossible to reconcile the dictum of Patteson, J., in *Payne v. Shedden* (1834), 1 M. & Rob. 383; 42 R. R. 808, that the use of a way for ten years, and an agreement for the next ten to discontinue the user, retaining the right, would be sufficient under the Act, with the decisions in the cases cited.]

(c) An uninterrupted enjoyment of more than nineteen years cannot be defeated by an interruption, not acquiesced in, of less than a year. *Flight v. Thomas* (1840), 8 Cl. & Fin. 231; 52 R. R. 468; [see this case explained by Lord Campbell, in *Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B. 272. But it does not follow that an inchoate right claimed by upwards of nineteen years' enjoyment will be protected by injunction: *Bridewell Hospital v. Ward* (1893), 62 L. J. Ch. 270; 68 L. T. 212; 3 R. 228; *Lord Battersea v. Commissioners of Severn*, [1895] 2 Ch. 708.

As to what amounts to acquiescence in an interruption, see *Glover v. Cole-*

*man* (1874), L. R. 10 C. P. 108; *Warwick v. Queen's College* (1870), L. R. 10 Eq. 105; *Seddon v. Bank of Bolton* (1882), L. R. 19 Ch. D. 462.]

(d) Per Parke, B., in *Flight v. Thomas* (1840), 11 A. & E. 699; 52 R. R. 468. "Sect. 4 speaks of the party interrupted. The statute seems to contemplate interruption of the right, not of the period."

(e) [To constitute an interruption under this section, it is essential that there should be "an actual discontinuance" of the enjoyment in fact, by reason of an obstruction submitted to and acquiesced in for a year (*Plasterers' Co. v. Parish Clerks' Co.* (1851), 6 Exch. 630; 86 R. R. 413); but repeated interruptions in fact, though each too short to operate as "an interruption," as defined by this section, may yet be sufficient, and are good evidence to show that the user all through was "contentious," and so not a user "as of right" within the statute. *Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B. 267; 85 R. R. 455; and see *Rogers v. Taylor* (1858), 2 H. & N. 828; *Gale v. Abbot* (1862), 8 Jur. N. S. 987; *Bennison v. Cartwright* (1864), 5 B. & S. 1; *Warrick v. Queen's College, Oxford* (1871), L. R. 6 Ch. 728; *Glover v. Coleman* (1874), L. R. 10 C. P. 108; and per Bowen, J., in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 786. An interruption which fluctuates during the year, such as a pile of cases from time to time removed and renewed, is not enough: *Prestland v. Bingham* (1889), L. R. 41 Ch. Div. 268.]

the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right (*f*) by the occupiers of the tenement in respect whereof the same is claimed (*g*) for and during such of the periods mentioned in this Act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or (*h*) on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment (*i*), the same shall

2 & 3 Will. 4,  
c. 71.

party used to allege his claim from time immemorial, the period mentioned in this Act may be alleged; and exceptions or other matters be replied specially.

(*f*) The omission of these words in a plea will make it bad, even after verdict: *Holford v. Hankinson* (1844), 5 Q. B. 584; [and it was in one case laid down that they would be necessary in a plea founded upon the enjoyment of light under sect. 3: *Harbidge v. Warwick* (1849), 3 Exch. 552, per Parke, B.: 77 R. R. 725. But the point was not essential to the decision in that case, and the opinions expressed in the judgments in *Merchant Taylors' Co. v. Truscott*, *Frewen v. Philipps*, and *Ladyman v. Grave* and a comparison of *Fear v. Morgan* with *Kilgour v. Gaddes*, ubi sup., show that they would not. As to the meaning of these words, see *Gardner v. Hodgson's Kingston Brewery Co., Ltd.*, [1903] A. C. 229; affirming [1901] 2 Ch. 198.

(*g*) [The words "the tenement in respect whereof the same is claimed," in this section, have given rise to a question, whether rights of common in gross and other incorporeal rights in gross are within the statute, and can be claimed under it.

The first and second sections expressly extend to "any claim which may lawfully be made, by custom, prescription, or grant, at the common law;" and it is beyond all doubt that rights of common in gross and other incorporeal rights in gross may lawfully be claimed at common law. Such rights are equally within the mischief against which the Act was directed, and ought not, it was said, to be held excluded merely because the form of pleading mentioned in sect. 6 is only appropriate to rights appurtenant. Parke, B., in *Welcome v. Upton* (1839), 5 M. & W. 404, says, "I am not sure that by a liberal construction of the 5th section it might not be made to include them," i.e., rights in gross.

The question was considered but not decided in *Bailey v. Stephens* (1862), 12

C. B., N. S. 113, and *Mounsey v. Ismay* (1865), 3 H. & C. 498. But in *Shuttleworth v. Le Fleming* (1865), 19 C. B., N. S. 687, it was decided that such a right is not within the Act. The defendant there claimed that he and his ancestor had for thirty, and sixty years before the action, enjoyed the right of fishing in Coniston Lake, and landing their nets on its banks. The Court held the plea bad. They said that the 5th section gave the key to the true construction of the Act. It "professes to enact forms of pleading applicable to all rights within the Act theretofore claimed to have existed from time immemorial, which forms it declares shall in such cases be sufficient. Those forms have clear relation to rights which are appurtenant to land, and to such rights only. The whole principle of the pleading assumes a dominant tenement, and an enjoyment as of right by the occupiers of it. The proof must, of course, follow and support the pleading. It is obvious that rights claimed in gross cannot be so pleaded or proved." This decision was followed by Farwell, J., in *Mercer v. Denne*, [1904] 2 Ch. 534, 540; affd. [1905] 2 Ch. 538; and by Buckley, J., in *Ramsgate Corporation v. Debling* (1906), 22 T. L. R. 369; 70 J. P. 132. In *Mercer v. Denne*, on appeal, [1905] 2 Ch. 538, the decision of Farwell, J., was affirmed upon grounds which rendered the consideration of this point unnecessary, and the point was expressly kept open by Stirling, L. J.; see p. 586.]

(*h*) [The disabilities mentioned in sect. 7 fall within this alternative, even if they are excluded from the first branch of the alternative by the use of the word "hereinbefore."]

(*i*) [This means any matter of fact or law not inconsistent with the simple

2 & 3 Will. 4, c. 71. be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

No presumption to be allowed from shorter periods than are herein mentioned as applicable.

"Sect. 6. And be it further enacted, That in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim (k).

Proviso for disabilities.

"Sect. 7. Provided also, That the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during

fact of enjoyment as required by the statute, i.e., a continuous enjoyment as of right (*Tickle v. Brown* (1836), 4 A. & E. 369, 382; 43 R. R. 358), and as an easement (*Onley v. Gardiner* (1838), 4 M. & W. 496; 42 R. R. 704). And, consequently, any fact inconsistent with the former, such as permission asked at any time during the period (*Tickle v. Brown*, ubi sup.; *Beasley v. Clarke* (1836), 2 Bing. N. C. 705), or payment of a rent in respect of the enjoyment (*Gardner v. Hodgson's Kingston Brewery Co., Ltd.*, [1903] A. C. 229; affirming [1901] 2 Ch. 198), or with the latter, such as unity of actual possession at any time during the period, or such a state of the ownership of the alleged dominant and servient tenement as that there could not be an enjoyment as of right (as in *Warburton v. Parke* (1857), 2 H. & N. 64, where, during part of the period, the reversioner of the tenants exercising the alleged right was tenant for life of the land over which it was exercised, or in *Kilgour v. Gaddes*, [1904] 1 K. B. 457, where the respective tenements in respect of and over which a right of way was claimed were the property of the same owner, but were in lease, during the period, to different tenants), may be proved upon a mere traverse of the enjoyment.

But anything not inconsistent with such enjoyment, as ex. gr., a licence extending over the whole period (*Tickle v. Brown*, ubi sup.); a tenancy for life or other of the disabilities included in sect. 7 (*Pye v. Mumford* (1848), 11 Q. B. 666); such facts as that during the first

part of the period of enjoyment, the user was by virtue of the provisions of an Act of Parliament, but was continued after they had ceased to be in force, and that there had been no right in existence before the Act (*Kinloch v. Nevile* (1840), 6 M. & W. 795; 55 R. R. 784); cannot be given in evidence upon a traverse of a plea under the statute, but must be specially replied.

The difficulties to which a plaintiff was formerly exposed upon questions of this kind have been removed by alterations in the law of pleading; they never can arise in cases where the question is raised upon a traverse of a right alleged in general terms, as in the case of a declaration alleging a right to an easement by reason of the possession of a tenement; in such cases, the defendant may take every possible objection under the Act upon a mere traverse of the right so alleged: see chapter on Pleading, post.]

(k) See *Bright v. Walker* (1834), 1 C. M. & R. 211; 40 R. R. 536. [User for a less period than the prescribed number of years is not wholly inoperative; it may, in conjunction with other circumstances, bear its natural weight as evidence of a grant. Thus, taking vitreous sand from copyhold tenements by copyholders for less than thirty years, coupled with evidence of taking other sand from the copyhold for more than thirty years, was held to prove an immemorial custom to take sand generally. (*Hanmer v. Chance* (1865), 11 Jur. N. S. 397; 34 L. J. Ch. 413.)]

which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (l).

2 & 3 Will. 4,  
c. 71.

"Sect. 8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (m) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years (n), in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (o).

Time excluded in computing the term of forty years appointed by this Act in favour of the reversioner of the servient tenement.

"Sect. 9. And be it further enacted, That this Act shall not extend to Scotland [or Ireland (p)]."

Not to extend to Scotland.

(l) Sect. 7 must be read with sect. 4, and the period of any tenancy for life must be excluded [if properly pleaded] in the computation of the periods of thirty years: *Clayton v. Corby* (1842), 2 Gale & D. 174; 57 R. R. 807; [2 Q. B. 813, S. C.; *Pye v. Mumford* (1848), 11 Q. B. 666. It appears from the judgments in these cases, that if the tenancy for life be replied to a plea of enjoyment under the Act, the defendant may show, by way of rejoinder, that he has had an enjoyment for the required period, excluding the time of that tenancy, such period being "constructively" next before the suit; but that if the plaintiff does not reply the tenancy, but simply traverses the enjoyment, the case will be determined as if there had been no tenancy for life at all. See also the observations of Parke, B., in *Onley v. Gardiner* (1839), 4 M. & W. 500, as to the effect of excluding the period, being in effect to increase the total required period of enjoyment, and not simply to connect two discontinuous periods absolutely excluding the time of disability.]

(m) [See below, p. 211.]

(n) [The judges of the Court of Queen's Bench laid down in the case of *Palk v. Shinner* (1852), 18 Q. B. 568; 88

R. R. 703, that the 8th section applies only to the period of forty years, and therefore that the time during which the premises are under lease for a term exceeding three years is not to be excluded in the computation of the period of twenty years' enjoyment of a right of way; but the question whether the tenancy for years, though not to be absolutely excluded under sect. 8, might not be made use of in another way to defeat the user, is a different matter. See post, p. 220, note (z).]

(o) [In *Symons v. Leaker* (1885), L. R. 15 Q. B. D. 629, Field and Manisty, JJ., acting upon an opinion expressed by Jessel, M.R., in *Laird v. Briggs* (1881), L. R. 19 Ch. Div. 22, held that "reversion" does not include "remainder."]

(p) By 21 & 22 Vict. c. 42, the Act is extended to Ireland from and after the 1st January, 1859. And by 37 & 38 Vict. c. 35 (the Statute Law Revision Act, 1874), the words "or Ireland" are struck out of sect. 9; and sect. 10, which enacts that the Act shall commence and take effect on the first day of Michaelmas Term then next ensuing, and sect. 11, which allows it to be amended during the session, are repealed.

Effect of the  
Prescription  
Act.

With the exception of the right to light, two distinct periods of user with respect to easements are specified by the Prescription Act. As far as concerns the shorter period fixed—an enjoyment for twenty years—the statute seems to be merely a declaration in accordance with the law as it before stood (*q*); it enacted only that the right should not be defeated by showing the commencement of such user to have been within the time of legal memory, but allowing such user to be defeated in any other way by which its effect might previously have been destroyed.

The enactment as to the longer period of forty years materially restricts the common law modes of defeating the effect of user of an easement, declaring that user for that time shall give an absolute and indefeasible right (*r*), notwithstanding any personal disability on the part of the owner of the servient inheritance (*s*), unless it shall appear that the same was enjoyed under some consent or agreement by deed or writing.

In all cases in which an easement is claimed under the statute by user, such user must be shown to have existed during the requisite periods immediately preceding the commencement of some suit or action wherein the claim or matter to which such period may relate shall come in question (*t*).

Exception for  
disabilities.

Where, however, the servient tenement, upon, over, or from which any such way, or other convenient watercourse or use of water, shall have been or shall be claimed or derived, has been held during the whole or any part of the forty years, “under any term of life or any term of years exceeding three years from the granting thereof,” “the time of the enjoyment during the continuance of such term shall be excluded in the computation,” provided that the claim to the easement founded on the user shall be resisted by the reversioner within three years after the determination of such term (*u*).

(*q*) [In *Palk v. Skinner*, ubi sup., Erle, J., said, “the statute makes no difference in the modes of defeating the user, except as it provides that it shall not be defeated by proof of origin at some time prior to the twenty years;” but the proposition in the text must be taken with some qualification, in consequence of the provisions of sect. 4. and the decisions thereupon, the effect of which is to expose the claimant to some difficulties first introduced by the Act, and mentioned

ante, p. 202, note.]

(*r*) Sect. 2. [This paragraph in the text deals only with the acquisition of easements under this section, but it is applicable also to the acquisition of profits à prendre under sect. 1, with the substitution of the period of sixty years mentioned in that section for the period of forty years mentioned in this paragraph of the text.]

(*s*) Sect. 7.

(*t*) Sect. 4; see p. 205, ante, note.

(*u*) *Wright v. Williams* (1836), 1 M.

The peculiar language of this section (sect. 8) must be observed. It is not in terms extended to every description of easement as in the 2nd section, but is confined "to a way or other convenient watercourse or use of water." "No doubt," said Parke, B., in *Wright v. Williams* (x), "there is a mistake in the 8th section, probably a miscopying in the insertion of the word 'convenient' instead of 'easement.'" If the word easement were substituted, as suggested by the learned judge, the language of the two sections would be identical.

Exception for disabilities.

No case has yet arisen in which the Courts have been called upon to decide whether effect could be given to the presumed intention of the legislature, or whether the exemption must be strictly confined to the two kinds of easement mentioned in the statute (y). It may, however, be suggested that by reading "convenience" instead of "convenient," a word which in the old books is synonymous with easement, the language would be sufficient to give effect to the intentions of the framers of the statute, without any violent perversion of the words.

After an enjoyment of forty years, the extent of the exemption contained in the 8th section appears to amount to this:—The period during which the owner of the servient inheritance has not been "valens agere," in consequence of the existence of a lease for life or for more than three years, is altogether excluded in the computation of the time during which the user has been enjoyed, provided he contests the claim within three years after the lease expires; so that if the first twenty of the forty years' user were had at a time when the servient tenement was not so held under lease, the owner of such tenement would be barred, even though he brought his action within the three years from the expiration of the lease; and it would also seem that for the same reason he would equally be barred, though the tenement had been held during the first eighteen and the last two years of the forty without lease, the

& W. 77; 46 R. R. 265; *Onley v. Gardiner* (1838), 4 M. & W. 496; *Richards v. Fry* (1838), 7 A. & E. 698; 45 R. R. 816; *Jones v. Price* (1836), 3 Bing. N. C. 52; 3 Scott, 376; [*Laird v. Briggs* (1881), L. R. 16 Ch. D. 440; 19 Ch. Div. 22; *Symons v. Leaker* (1885), L. R. 15 Q. B. D. 629.]

(x) (1836), 1 M. & W. 77; 46 R. R. 265. [The suggestion does not appear by the report to have been made by the judge in this case; but it is found in

counsel's arguments, as reported in Tyr. & Gra. at p. 390.]

(y) See *Lyde v. Barnard* (1826), 1 M. & W. 101; 46 R. R. 269, observations of the judges upon the word "upon" in stat. 9 Geo. 4, c. 14, s. 6; and *Wright v. Williams* (1836), 1 M. & W. 77; 46 R. R. 265. [In *Laird v. Briggs* (1881), L. R. 19 Ch. Div. 22, the point was expressly kept open by the Court of Appeal.]

Exception for disabilities.

tenement being held on lease during the intervening period of twenty years; the time of user during the leases is simply to be excluded, and there appears to be nothing to prevent the tacking together of the two periods of eighteen and two years during which there has been a valid user. This point, it is true, has not yet arisen; but the case appears to be exempted from the rule requiring twenty years' enjoyment next before action brought, by the express enactment of the statute—that the time during which the property was so held on lease shall be excluded from the computation of the period of forty years (z).

Supposing, then, that the period during which the servient tenement has been so in lease is simply to be excluded in the computation of the time, and to be considered in law as though it had never been, a further question arises whether the user, during the remaining twenty years, when there was no such demise, can be defeated as in ordinary cases; for instance, by showing that the owner of the inheritance was during the whole or part of that time under a disability. By the 7th section, the provision in favour of disabilities does not apply to the cases "where the right or claim is declared to be absolute and indefeasible;" and it may be urged that the policy of the law is, after so long an enjoyment, to clothe such user with the legal right without allowing the general object to be defeated by too minute provisions. To this, however, it may be replied that if the period of the subsistence of the lease is to be excluded, the reversioner does not obtain complete protection unless he stands in the same position to all intents and purposes as he would do in the ordinary case of a user of twenty years, when the servient tenement was not under lease; and the words of the 7th section of the statute may be satisfied by supposing it to mean only that, in the computation of the period of forty years, for the purpose of throwing upon the owner of the inheritance the onus of showing that he was under

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(z) [The views of the learned author are confirmed by the judgments of the Court of Queen's Bench in *Clayton v. Corby* (1842), 2 Q. B. 813; 57 R. R. 807, and *Pye v. Mumford* (1848), 11 Q. B. 675, upon the effect of excluding the periods of disability under sect. 7. They are excluded for the benefit of the person resisting the claim, and not of the person setting it up; if, therefore, there has in fact been an interruption

by the tenant for life or other occurrence during the tenancy affecting the enjoyment, this may be shown, in order to defeat the claim, and the claimant could not get rid of the objection by saying that the tenancy was to be excluded in his favour, so as to shut out such objection.

See also the judgment of the Court of Appeal in *Hollins v. Verney* (1884), L. R. 13 Q. B. Div. 304.]

the particular disability of a reversioner, no time of general disability is to be deducted; but that the fact of his being a reversioner being once established, and the question, therefore, then being whether there has been a valid user of twenty years, that must be decided as if it stood completely abstracted from the time during which the servient tenement was in lease; or that, in other words, in computing the period of forty years, disability [under sect. 7] shall never be deducted—in computing that of twenty years, always [if properly set up in the pleading (a)].

Exception for disabilities.

With regard to light, by the 3rd section, twenty years' un- **Light.** interrupted enjoyment (b) confers an absolute and indefeasible right, with the single exception of the case in which such enjoyment was had under written agreement. The 8th section of the statute does not in terms apply to the easement of light, and the only period of time there mentioned is "forty years," so that, even supposing the courts should hold that section to apply to easements in general, it would still be a question whether light could be included in it. This would depend upon whether the expression "period of forty years" could be taken to be synonymous with the period in which these rights became absolute, subject to the proviso contained in that section (c).

By the construction given to the clause (sect. 4) of the statute, enacting "that no act or matter shall be deemed to be an interruption within the meaning of the statute, unless the same shall be submitted to or acquiesced in for one year after the party shall have had or shall have notice thereof," an enjoyment

(a) The judgments in *Clayton v. Corby*, and *Pye v. Mumford* (ante, p. 212, note), fully establish the propositions contended for by the learned author. There are in short two distinct modes of making out a right to an easement under the 2nd section, one by twenty years' user and another by forty years' user. If the twenty years' user be pleaded, and a tenancy for life be replied, it is competent for the claimant, by sect. 7, to rejoin and prove a twenty years' user (excluding the time of the tenancy for life), and if he do not he will fail. If the forty years' user be set up, and a tenancy for life or for years be replied, the claimant is driven, by sect. 8, to rejoin and prove a forty years' user, excluding those periods: but whether the claimant relies upon a

twenty years' user by reason of his not having in fact had a user for forty years, or by reason that the provisions of sect. 8 furnish an answer to his forty years' user, is quite immaterial, and the question whether there has been a good twenty years' user in the one case constructively, in the other actually, next before the suit, must be decided in each case according to the same rules.

(b) [Of the access of it as an easement, see *Harbidge v. Warwick* (1849), 3 Exch. 552; 77 R. R. 725; and see above, p. 200, note (c).]

(c) [In *Palk v. Skinner*, post, p. 220, note (z), the judges were clearly of opinion that sect. 8 only applies to the period of forty years; but whether or no, light is not within sect. 8.]



for the full period, minus any time less than a year, has been construed to give a right (*d*).

No title given  
by enjoyment  
during shorter  
time.

An opinion seems, on one occasion, to have been expressed, that, before the statute, a licence might be presumed from a length of user insufficient to raise the presumption of a grant, so as to justify the exercise of an affirmative easement until such licence was countermanded (*e*). That such user shall be altogether insufficient to give a right is provided by the section which enacts, That no presumption shall be made in favour of any claim from the exercise or enjoyment of the thing claimed during a shorter period than that specified by the statute (*f*).

Inter præ-  
sentes et  
absentes.

The period of prescription fixed by the civil law was ten years where the party sought to be charged was present, and twenty where he was absent.

Code Civil.

By the French Code Civil thirty years' user is sufficient to confer a title to all those easements which are, from their nature, susceptible of being claimed by prescription (*g*).

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SECT. 2.—*The persons against and by whom the Enjoyment must be had.*

Persons  
against whom  
enjoyment is  
valid.

As it is essential to the existence of an easement, that one tenement should be made subject to the convenience of another, and as the right to the easement can exist only in respect of such tenement, the continued user by which the easement is to be acquired must be by a person in possession of the dominant tenement: and as such user is only evidence of a previous grant—and as the right claimed is in its nature not one of a temporary kind, but one which permanently affects the rights of property in the servient tenement—it follows that [by the common law] such grant can only have been legally made by a party capable of imposing

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(*d*) [I.e., after the expiration of the full period of twenty years; above, p. 206, note (*c*).]

(*e*) *Doe d. Foley v. Wilson* (1809), 11 East, 66.

(*f*) Sect. 6. [See the observations of Patteson, J., in *Carr v. Foster*, and Parke, B., in *Lowe v. Carpenter*, cited ante, p. 205, note (*b*); *Hollins v. Verney* (1884), L. R. 13 Q. B. Div. 304; *Bonner v. Great*

*Western Rail. Co.* (1883), L. R. 24 Ch. Div. 1. But such an inchoate right may be the subject of compensation under the Lands Clauses Acts: *Re London, Tilbury, and Southend Rail. Co. and Trustees of the Gover's Walk Schools* (1889), L. R. 24 Q. B. Div. 326; *Barlow v. Ross* (1890), *ibid.* 381.]

(*g*) Pardessus, *Traité des Servitudes*, 424.

such a permanent burthen upon the property—that is, the owner of an estate of inheritance (*h*); and therefore, in order that such user may confer an easement, the owner of the servient inheritance must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed; his abstaining from interference will then be construed as an acquiescence (*i*). *Contra non valentem agere non currit præscriptio*.

Acquiescence of owner of inheritance required [at common law].

The want of acquiescence of the owner of the inheritance of the neighbouring tenement may, it would seem, be inferred, either from the circumstance that he is not in possession, or from the nature of the enjoyment of the right, it being, in truth and in fact, out of the view and knowledge of such neighbouring owner, though he be in possession. With respect to the former question an important point arises, whether, if the knowledge in fact of the owner of the inheritance of the hostile enjoyment of an easement be shown, he is bound by it. Cases decided before the Prescription Act certainly lay down, that if knowledge in fact of the reversioner be shown, he would be bound; but in one of the cases a learned judge (*k*) took a distinction between two divisions of easements, expressing an opinion to the effect, that an enjoyment of a negative easement would not bind the reversioner, unless his knowledge were positively shown, though it would be otherwise of an affirmative easement.

If it be taken as law, that a reversioner can be bound by his knowledge in fact of a user enjoyed during the time his land is in the possession of a tenant, as his acquiescence in such cases is inferred from his offering no opposition, it would seem that he must have, by law, some valid mode of preventing the right from vesting by the continuance of the user. With respect to a negative easement it is clear the exercise of such a right gives no right of action to any person; and even as to some positive easements, such

(*h*) *Daniel v. North* (1809), 11 East, 372; [*Bradbury v. Grinsell* (1800), 2 Wms. Saund. 175 (d) (e); *Roberts v. James* in (1903), 89 L. T. 282. The rule stated the text applies also to the acquisition, under the Prescription Act, 1832, of easements other than light (*Kilgour v. Gaddes*, [1904] 1 K. B. 457); but it is otherwise with regard to an easement of light under the Act. *Fear v. Morgan*, [1906] 2 Ch. 415; *affd. sub nom.*

*Morgan v. Fear* (1907), W. N. 196.]

(*i*) *Gray v. Bond* (1821), 2 Brod. & Bing. 667; 5 J. B. Moo. 527; 23 R. R. 530; [*Roberts v. James* (1903), 89 L. T. 282].

(*k*) Per Le Blanc, J., in *Daniel v. North* (1809), 11 East, 372; and *semble* also by Parke, J., in *Gray v. Bond* (1821), 2 B. & B. 667; 5 J. B. Moo. 535; 23 R. R. 530.

Acquiescence of owner of inheritance required [at common law].

Effect of notice by reversioner.

as a right of way, it is doubtful whether the reversioner could maintain an action (*l*); and, during the continuance of the tenancy he

(*l*) ["In order to maintain the action it was necessary for him to aver and prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied by a claim of right, is not necessarily injurious to his reversionary interest." Per Parke, J., *Baxter v. Taylor* (1832), 4 B. & Ad. 76. *Baxter v. Taylor* was acted upon in *Simpson v. Savage* (1856), 1 C. B., N. S. 352, in which the Court held that no action lies by a reversioner, for a smoke nuisance caused by lighting fires in a factory and causing smoke to issue so as to be a nuisance to the reversioner's tenants and make them give notice to quit; and a very similar point was decided in *Mumford v. Oxford, Worcester and Wolverhampton Rail. Co.* (1856), 1 H. & N. 34, where the complaint was for causing loud noises, and the Court held that the action would not lie; and see *Damper v. Bassett*, [1901] 2 Ch. 350. It would be foreign to the subject of this book to discuss the question how far these cases can be reconciled with the old authorities, referred to by the Court in *Bell v. Midland Rail. Co.* (1861), 10 C. B., N. S. 287, as to the right of action for causing tenants to leave their tenements. In both cases the Court relied upon the fact that the injury complained of was not of a permanent character, although unquestionably the repetition of such acts would furnish evidence against the reversioner, whether he might be able to rebut it or not. In *Kidgill v. Moor* (1850), 9 C. B. 372, Maule, J., referring to the dictum of Parke, B., in *Baxter v. Taylor*, says, "My brother Parke does not say that it would not be evidence if the party claimed a right of way and meant to assert it;" and in *Tickle v. Brown* (1836), 4 A. & E. 378, Patteson, J., said, "before the statute the acts of the tenants would have been evidence against the reversioner, though their declarations were not so." In *Palk v. Skinner* (1852), 18 Q. B. 575, where, there being a user of twenty years, during the first fifteen years of which the premises were under lease, Erle, J., said, if this case had arisen before the statute, there would have been good evidence to go to the jury, notwithstanding the existence of the tenancy,

and the question is still to be left to the jury in the same way; and see the judgments in *Daniel v. North* (1809), 11 East, 372; *Linehan v. Deeble*, 9 Ir. C. L. R. 305; *Cooper v. Crabtree* (1882), L. R. 20 Ch. Div. 589; *Hanna v. Pollock*, [1900] 2 Ir. R. 664; and below, Part VI. Chap. II. sect. 2.

It seems unjust to deprive the reversioner of an immediate remedy in respect of acts which may at a future time furnish evidence against him, and which though he may possibly in many cases be able then to rebut, must in all cases involve him in trouble and expense, by affecting the evidence of his right. The point is akin to that which is raised in actions by reversioners for obstructions by others to the enjoyment of easements by their tenants, the ground of which action is, that the evidence of the right of the reversioner to the easement is affected, as his acquiescence in the obstruction would furnish evidence against him of a renunciation and abandonment of it. See per Tindal, C. J., *Bower v. Hill* (1835), 1 Bing. N. C. 549; 41 R. R. 630.

In *Kidgill v. Moor* (1850), 9 C. B. 364; 82 R. R. 364, the plaintiff sued for the locking of a gate across a way to which the tenants of the plaintiff were entitled in respect of the tenement of which he was reversioner, and it was objected, on motion in arrest of judgment, that the act complained of was not of a permanent character; but the Court held that the declaration was good, as such an act might operate as an injury to the reversionary interest, and that the question whether the plaintiff is injured in his reversionary estate is one of fact for the jury. Maule, J., said, "I cannot doubt that there may be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff's reversionary interest as the building of a wall; and the allegation that the plaintiff was injured in his reversionary interest is an allegation of matter of fact . . . which is for the jury to find according to the evidence." And in *The Metropolitan Association v. Petch* (1858), 5 C. B., N. S. 504, a declaration in an action by a reversioner for obstructing ancient lights by the erection of a hoarding was sustained, the Court holding that such an erection might be an injury to the reversion, and that it was for the jury to determine. In

may be unable either to interrupt the enjoyment or to compel his tenant to do so. Unless, therefore, some positive act, as a notice, intimating his dissent, be sufficient to obviate the effect of the user giving a right, he would not be brought into the condition of a "valens agere," without which the prescription ought not to run against him.

Effect of  
notice by  
reversioner.

Bracton, treating of the qualities of a possession necessary to confer a right, appears to consider that such notices, at all events if followed up by an action as soon as the party is in a condition to bring one, will amount to an interruption.

"Continuam dico ita quod non sit interrupta; interrumpi enim poterit multis modis sine violentiâ adhibitâ, per denuntiationem et impetrationem diligentem, et diligentem prosecutionem, et per talem interruptionem, nunquam acquireret possidens ex tempore liberum tenementum" (m).

And in speaking of this precise case—of a particular estate existing in the servient tenement during the user of the easement—he seems to be clearly of opinion that such a prohibition will be sufficient to preserve his right.

"Si autem fuerit seisinâ clandestina, scilicet in absentiâ domini norum vel illis ignorantibus, et si scirent essent prohibitori, licet hoc fiat de consensu vel dissimulatione ballivorum, valere non debet" (n).

In the case of *Arkwright v. Gell* (o), great stress was laid by the Court upon the difficulty, on the part of the servient owner, of resisting the enjoyment.

"But though," says Mr. Serjeant Williams, "an uninterrupted possession for twenty years or upwards should be sufficient evidence to be left to a jury to presume a grant; yet the rule must ever be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate of inheritance. For if a tenant for term of years, or life, permits another to enjoy an easement on his estate for twenty years or upwards, without

Persons  
against whom  
enjoyment  
is valid.

that case also the judges lay down that the way in which the act might injure the reversioner would be by *affording evidence in denial of the right*. According to the last class of cases, the jury might find for plaintiff if the act complained of would furnish any evidence in denial of the right. It is difficult to discover any principle upon which the reversioner should be without remedy by action in

respect of a series of separate acts of obstruction furnishing evidence in denial of the right, while he has such action in the case of the wooden hoarding intervening, or why a series of trespasses in the assertion of a right of way should not give a right of action to a reversioner.]

(m) Lib. 2, f. 51 b.

(n) Lib. 4, f. 221.

(o) (1839), 5 M. & W. 203.

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interruption, and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession he may dispute the right to the easement, and the length of possession will be no answer to his claim. Thus, where A., being a tenant for life, with a power to make a jointure, which he afterwards executed, gave licence to B. in 1747, to erect a wear on the river T. in A.'s soil, for the purpose of watering B.'s meadows, and then A. died, and the jointress entered and continued seised down to the year 1799, when the tenant of A.'s farm diverted the water of the river from the wear; upon which the tenant of B.'s farm brought an action on the case for diverting the water; it was held by the Court of King's Bench that the uninterrupted possession of the wear for so many years, with acquiescence of the particular tenants for life, did not affect him who had the inheritance in reversion; but as the Court entertained some doubt of the fact of the licence, and as the verdict for the plaintiff would not conclude the rights of the parties, they did not think it right to disturb the verdict: but the Court was of opinion upon the point of *law* as above stated" (p).

*Daniel v.  
North.*

In *Daniel v. North* (q), which was an action for obstructing ancient lights, it appeared that the premises on which the obstruction was erected had been occupied, during twenty years, by a tenant at will, and there was no evidence that the owner of those premises was aware of such enjoyment.

Lord Ellenborough observed, on the argument for a new trial, "How can such a presumption be raised against the landlord, without showing that he knew of the fact when he was not in possession, and received no immediate injury from it at the time?" In delivering his judgment his Lordship said: "The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against a party capable of making the grant; and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him; and it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite pre-

(p) 2 Wms. Saund. 175 e; 2 Notes to Saund. 509. [Nota, it did not appear that there had been any user *except* in

the time of the particular tenant.] (q) (1809), 11 East. 372.

mises by a tenant, though for twenty years, without the knowledge of the landlord, will bind the latter, and there is no evidence stated in the report from whence his knowledge should be presumed."

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So in *Barker v. Richardson* (r), where lights had been enjoyed for more than twenty years contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under the statute 55 Geo. 3, c. 144, it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed.

*Barker v.  
Richardson.*

The cases above cited were decided before the passing of the statute 2 & 3 Will. 4, c. 71, and it is important to observe, that the law with regard to the easement of window lights under that statute stands upon an entirely different footing from that applicable to all other easements; at all events, with regard to its acquisition.

By the statute, twenty years' enjoyment of the access of light to a house or building, without interruption, confers an absolute and indefeasible right, unless such user was had under some written agreement. No provision appears to be made for the circumstance of the premises, upon which the restriction is to be imposed, having been during the whole or any part of the time in the possession of a tenant, for the ignorance or acquiescence of the landlord, or even for cases in which it may have been absolutely impossible for him to have interfered at any time during the twenty years; [and it has accordingly been expressly decided that a right to light may be absolutely and indefeasibly acquired, under section 3 of the statute, so as to be permanently annexed to the dominant tenement, as against the servient tenement, by twenty years' enjoyment without interruption, even though during the whole period the dominant and servient tenements are held under lease by different lessees under a common landlord (s).

The right to light now depends upon the positive enactment of the statute. It is matter *juris positivi* and does not require, and

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(r) (1821), 4 B. & A. 579; 23 R. R. 400; see also *Runcorn v. Doe*, dem. Cooper (1826), 5 B. & C. 696; 8 Dowl. & R. 460.

(s) *Fear v. Morgan*, [1906] 2 Ch. 406; affd. sub nom. *Morgan v. Fear* (1907), W. N. 196.

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[ought not to be rested on, any presumption of grant (*t*). And it has accordingly been held that the right can be acquired, by enjoyment for the statutory period, against a statutory company incapable of making the grant (*u*).]

The cases, therefore, of ancient windows above cited are [not now of application,] except in cases where by reason of the claimant not suing in time, he is driven to rely on the common law right; but as the statute does not appear to have made any material alteration in the law as applicable to the user of other easements for a period of twenty years, these decisions are at all events authorities in the case of all those rights to which, before the passing of the statute, the law of light was analogous (*x*).

“During the period of a tenancy for life, the exercise of an easement will not affect the fee. In order to do that, there must have been that period of enjoyment against the owner of the fee” (*y*).

With regard to all [affirmative] easements, the law as to the servient tenement not being in the possession of the owner of the inheritance, where knowledge in fact on his part can be shown, would appear to be the same as before the statute. But where the servient tenement “upon, over, or from which any way, or other convenient watercourse, or use of water,” is claimed, has been held under any term of years exceeding three years from the granting thereof, the user during the continuance of such term is excluded in the computation of the period of forty years (*z*), pro-

(*t*) *Tapling v. Jones* (1865), 11 H. L. C. 290; *Hyman v. Van den Bergh*, [1908] 1 Ch. 167, 176, per Farwell, L. J.

(*u*) *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*, [1898] 2 Ch. 614; on appeal, [1899] 2 Ch. 217.

(*x*) See *Wall v. Nixon* (1805), 3 Smith, 316; 8 R. R. 725.

(*y*) Per Curiam in *Bright v. Walker* (1834), 1 C. M. & R. 422; 40 R. R. 536; *Roberts v. James* (1903), 89 L. T. 232; [but this does not apply to light (see *Freven v. Philipps*, ante, p. 204, note (*x*); *Fear v. Morgan*, ubi sup.); and in the case of other easements, if the reversioner does not reply the existence of the tenancy for life to a plea of enjoyment under the Act, the fee will be bound by the enjoyment under and against the tenant for life. This point could not arise in *Bright v. Walker*, 40 R. R. 536, where the point was not

raised on a traverse of a plea under the statute, but upon a traverse of a declaration alleging a right in general terms, under which traverse every possible objection was open.

As to whether an easement not good against the fee can be good against a tenant for years, see *Wheaton v. Maple, L. R.*, [1893] 3 Ch. 48.]

(*z*) Both of the period of twenty and forty years. Per Cur. in *Bright v. Walker* (1834), 1 C. M. & R. 211; 40 R. R. 536. [But the judges in *B. R.* in *Falk v. Shinner* (1852), 18 Q. B. 575; 88 R. R. 703, were clearly of opinion that the forty years' period only is affected by sect. 8, and Erle, J., said, “The 8th section applies expressly to the computation of an enjoyment for forty years; it would be contrary to all the rules of construction to hold that it

vided the owner asserts his rights within three years after the expiration of the term.

In *Bright v. Walker* (a), where an action was by one lessee of the Bishop of Worcester against another lessee for obstructing a

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applies also to the computation of an enjoyment for twenty years. The only possible ground for such a conclusion is found in *Bright v. Walker*. But there the question was as to the exclusion of a tenancy for life, and the Court was clearly right in holding that such a tenancy must be excluded from the computation of twenty years' enjoyment. It is so excluded under sect. 7, and I do not see that its exclusion is made more clear by sect. 8; I do not think the learned judge ever meant to say that a tenancy for years must be excluded from the computation of an enjoyment for twenty years."

In *Palk v. Shinner*, a way had been used for twenty years, during the first fifteen of which the servient tenement had been under lease; and it did not appear whether the reversioner knew of the user during the lease, but at all events no resistance was made either during the fifteen years or the remaining years for which the land was in possession of the reversioner. Erle, J., told the jury that the fact of the land having been in lease for the fifteen years would not defeat the user; and, upon a rule nisi for a new trial for misdirection, the question principally argued was whether the 8th section of the statute applied to a twenty years' user, so that the tenancy should be *excluded*, and the Court expressed a clear opinion that it did not; but Erle, J., said, if this case had arisen before the statute, "there would have been good evidence to go to the jury of a user as of right for twenty years, notwithstanding the existence of the tenancy."

It should seem that any objection in respect of the land having been in lease which might have been taken at the common law may still be taken to a user for twenty years under sect. 2 of the statute, although the statutory process of excluding the time of the lease is not open except in the case of forty years' user.

On the other hand, in the case of forty years' user, unless the reversioner should resist the claim within three years from the termination of the tenancy, he could not set up the existence of the lease in any way—not by

way of exclusion from the computation, by reason of the express condition imposed by sect. 8, of resisting within the three years above mentioned, and not as at the common law by reason of the provisions of sect. 2, which, though they allow a twenty years' user to be defeated "*in any other way*" in which the same at the common law might be defeated, do not allow the forty years' user to be so defeated, but only by showing that the enjoyment was had under a written agreement, so that but for the 8th section the reversioner could make no use of the fact of the tenancy at all.

In short, there are two distinct ways in which the existence of a term of years may be taken advantage of:—

1. As showing, in connection with the other circumstances of the case, that there has not been enjoyment binding against the reversioner, ex. gr. as in the case of an enjoyment for twenty years, commencing during tenancy and continued through it, and not known to him and his agents.

2. As entitling the reversioner to have the period of enjoyment during the term *excluded* from the period of computation, so as virtually to extend the period of enjoyment required to be proved.

The first way was open at the common law, and is left untouched by the statute in so far as the period of twenty years' user under sect. 2 is concerned, but is not left in the case of the forty years' user. The second way is the creature of the statute, and, according to the case of *Palk v. Shinner*, is only applicable to a case of forty years' user; but if the person resisting the claim does not, by resisting it within three years from the end of the term, comply with the condition upon which only by the 8th section he can take advantage of the statutory mode of altogether excluding the term from the computation of the period of enjoyment, he is debarred from setting up the fact of the existence of the tenancy for years at all.]

(a) (1834), 1 C. M. & R. 211; 40 R. R. 536; [and see *Kilgour v. Gaddes*, [1904] 1 K. B. 457.]



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*Bright v.  
Walker.*

way, the evidence of the right consisted of an user for twenty years, during which time the land of the defendant had been in lease for lives; the Court of Exchequer held that the plaintiff had gained no right by such user against the bishop or any other person. But no evidence was given, nor was the question in any way raised, of the knowledge or acquiescence of the bishop (*b*).

Upon the point how far the reversioner is bound by an enjoyment had during the continuance of a particular estate, two questions of great doubt and difficulty have been introduced by the statute:—

1st. Supposing the reversioner, being aware of the fact, from time to time gives a parol or written notice of his dissent to the enjoyment of the easement, any active interference on his part being prevented by the existence of the particular estate—

2nd. Supposing the reversioner to be in total ignorance of any such enjoyment having been had during the continuance of the particular estate, and in consequence of such ignorance not to have availed himself of the exception in his favour contained in the statute—

In either of these cases would a valid right to an easement be acquired?

[In the case of light the answer to this question is in the affirmative (*c*). In the case of other easements it would appear to depend upon whether the user is of twenty years or forty years, and, if of twenty years, whether the reversioner is entitled expectant on a term of years, or on a life tenancy.

If the user is of twenty years the reversioner expectant on a life tenancy would not be bound, by reason of the exclusion of the period of disability under section 7; as, however, section 7 does not exclude the period during which the servient tenement shall have been in lease for a term of years, and section 8 applies only to the period of forty years, it would seem that, so far as the statute is concerned, he would be bound, if his reversion was expectant on a term of years.

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(*b*) [The life tenancy being *absolutely excluded* by sect. 7 in computing the period of twenty years, the knowledge or acquiescence should seem to be immaterial. It has already been pointed out, that in *Bright v. Walker* the question was raised in a form which enabled

the person resisting the claim to take every possible objection under the Act without the necessity of specially pleading the existence of the tenancy for life.]

(*c*) See the cases cited above, p. 204.

[If the user is of forty years, he would be bound, unless he resisted within three years from the expiration of the term, under section 8; or unless the circumstances were such (as, *e.g.*, in *Kilgour v. Gaddes* (*d*)) as not to admit of the user having been "as of right" against him.]

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At all events, if the user of any easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of such tenancy having continued during a period of twenty years will not, it seems, be sufficient to defeat the right acquired by the lapse of time, unless it be also shown that the landlord, up to the time of granting the lease, was in ignorance that any such right was claimed. Thus, where a house was proved to have been built thirty-eight years, during the whole of which time there had been windows towards the adjoining premises, and these premises had belonged for a number of years to a family residing at a distance, none of whom were proved to have ever seen them, and they had been occupied by the same tenant during the last twenty years—the Court held, that, after such a long enjoyment, the windows must be considered ancient windows, and that the plaintiff was consequently entitled to recover for their obstruction (*e*). Bayley, J., in his judgment, says, "The right is proved to have existed for thirty-eight years; the commencement of it is not shown. It is possible that the premises both of the plaintiff and defendant once belonged to the same person, and that he conferred on the plaintiff, and those under whom she claims, a right to have the windows free from obstruction. *Daniel v. North* has been relied on to show that the tenancy rebutted the presumption of a grant, but this is a very different case. Here tenancy was shown to have existed for twenty years, but the origin of the plaintiff's right was not traced. And Little-dale, J., adds, "It was proved that the windows had existed for thirty-eight years, and the tenancy for twenty. How the land was occupied for eighteen years before that time did not appear. I think that quite sufficient to found the presumption of a grant" (*f*).

As the claim of an easement is in derogation of the ordinary rights of property, it lies upon the party asserting such claim in

(*d*) [1904] 1 K. B. 457.

(*e*) *Cross v. Lewis* (1824), 2 B. & C. 686; 4 D. & R. 234; [and see now, *Fear v. Morgan*, [1906] 2 Ch. 406; *affd.* sub

nom. *Morgan v. Fear* (1907), W. N. 196.]

(*f*) [See *Palk v. Shinner*, ante, p. 220, note (*c*).]

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opposition to common right, in all cases to support his case by evidence. In *Cross v. Lewis*, the absence of any evidence as to the earlier state of the windows was indeed held to operate in favour of the plaintiff—the party claiming the easement; but the substantial proof, viz. of the user for a period of twenty years, had already been given by the claimant; and this, unrebutted by any evidence to take the case out of the ordinary rule, was of course sufficient to establish the easement.

From the observations of the learned judge in the above case, it would appear that, provided the existence of the easement prior to the commencement of the tenancy was shown, and a sufficient length of enjoyment had taken place to afford evidence of a grant, the burthen of proof would be thrown upon the owner of the land sought to be made liable to the easement; and unless he could show such previous user to have taken place without his knowledge, the right to the easement would be established (*g*).

Indeed it should seem from this case that proof of enjoyment for twenty years was in all cases *prima facie* evidence of a title which must be rebutted by the owner of the servient tenement.

With respect to the party against whom the right is to be established, as a grant from the owner of the servient tenement is to be presumed, disability on his part to execute such a grant will exclude the presumption which would otherwise arise from user during the continuance of such disability (*h*).

Disabilities  
in computing  
twenty years.

By the statute, in all cases of computing the twenty years' user, except in the case of light, the time during which the servient owner may have been an infant, idiot, non compos mentis, femme covert, or tenant for life, or during which any action or suit to dispute the right afterwards abated by the death of any party may have been pending, is excluded (*i*). No provision is made for the

(*g*) See *Gray v. Bond* (1821), 2 Brod. & Bing. 667; 5 J. B. Moo. 527; 23 R. R. 530.

(*h*) [But this does not apply to a right to light claimed under the Prescription Act, 1832, s. 3. *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614; on appeal, [1899] 2 Ch. 217.]

(*i*) [Under the 7th section these periods may be absolutely excluded, if properly pleaded, from the computation of the time of enjoyment; but, independently of that, advantage may still be taken of any of them, as at the common law, in respect of the shorter

periods of enjoyment, though not of the longer, ante, p. 221, note. And, in respect of statutory disabilities to grant (as in the case of *Mill v. New Forest Commissioners* (1856), 18 C. B. 60; *Rochdale Canal Co. v. Radcliff* (1852), 18 Q. B. 287), a distinction appears to exist between those cases where there is simply no power to grant, and in those where there is an absolute prohibition; in the latter case it should seem that an enjoyment, even for the longer period, would confer no right, though in the former it might. In neither can any right be gained under

case of a party being beyond the seas during the whole or any part of the period of prescription (*k*).

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Before the passing of the statute, an enjoyment of an easement for twenty years would have been evidence from which a jury might have found a non-existing grant from the owner of the particular estate, which would have been binding on him, although it could not affect the rights of the reversioner; but it was held in the case of *Bright v. Walker* that by virtue of the statute no such modified right to an easement can be acquired. To be valid against any under the statute, it must be valid against all who have any estate in the land.

"The important question," said Baron Parke, in *Bright v. Walker* (*l*), "is, whether this enjoyment, as it cannot give a title against all persons having estates in the locus in quo, gives a title as against the lessee and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the fee. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor in the locus in quo to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But, since (*m*) the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is 'for shortening the time of *prescription*;' and if the periods mentioned in it are to be deemed new times of pre-

the statute by enjoyment for the shorter period. See p. 191, note (*g*); and cf. *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Co.* (1866), L. R. 1 H. Lds. 254; *Lemaitre v. Davis* (1881), L. R. 19 Ch. D. 281.

There is nothing to prevent a railway company from erecting a hoarding on its own land to prevent the acquisition of a prescriptive right to light, see *Bonner v. Great Western Railway* (1883), L. R. 24 Ch. Div. 1; *Foster v. London, Chatham, and Dover Railway*, [1895] 1 Q. B. 711.]

(*k*) [But in such case, although the time of such absence could not be

absolutely excluded under sect. 7, the fact might be set up under sect. 2, if the person absent could show ignorance by himself or his agents of the fact of the enjoyment during the shorter period, but not the longer.]

(*l*) (1834), 1 C. M. & R. 220; 40 R. R. 536; *Monmouthshire Canal Co. v. Harford* (1834). Id. 614; 40 R. R. 648; [acc. *Winship v. Hudspeth* (1854), 10 Exch. 5; *Wheaton v. Maple*, [1893] 3 Ch. 48 (a case of light); *Kilgour v. Gaddes*, [1904] 1 K. B. 457; cf. *Hanna v. Pollock*, [1900] 2 Ir. R. 664.]

(*m*) [I.e., under; the common law rule remains.]

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scription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant” (o).

In this instance the enjoyment had continued during twenty years only. Where, however, the full period of forty years has elapsed, as that would confer a right to the easement, subject to the condition only that the reversioner interfered within three years after the determination of the particular estate, as in the cases of conditional estates, a valid right is given as against all the world, until by the happening of the conditions the estate is defeated.

*Wright v.  
Williams.*

“The enjoyment of the right during forty years,” said the Court in *Wright v. Williams* (p), “alleged in the pleas, being admitted, the replications, which state only an existing tenancy for life, are no answer; for the time of a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years *absolutely*, is, by the 8th section, excluded from the computation of the longer period of forty years *conditionally* only; that is, provided the reversioner expectant, on the determination of the term for life, shall, within three years (that is, probably, *before* the end of three years) after such determination, resist the right; and it does not appear that the plaintiff is entitled to the reversion *expectant on that lease*, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of Lord Dinorben, the *cestui que vie*, is therefore not to be excluded, on these pleadings, from the period of forty years; and,

(o) [*England v. Wall* (1842), 10 M. & W. 699.]

(p) (1836), 1 M. & W. 100; 46 R. R. 265.

such period being complete, the defendant is entitled to an indefeasible right to the easement claimed."

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against whom  
enjoyment is  
valid.

Although the user by which it is sought to acquire an easement must be that of the party in possession of the dominant tenement, yet any user under a claim of right in respect of such tenement will be in contemplation of law user by such possessor. Hence it appears that there is no disability (q) of any kind to destroy the effect of such user; unless, indeed, the extreme case adverted to in the civil law be supposed—of the only user being by a person not having the use of reason, in which case no right was acquired, the intention to assert a right not existing. This was illustrated by the instance of putting something into the hand of a man when asleep (r).

Persons to  
whom user  
will give an  
easement.

User by an infant capable of understanding what he was doing was sufficient to acquire the servitude. So also was user by a tenant or servant, even without the owner's knowledge (s).

(q) [Except a statutory incapacity. See *National Manure Co. v. Donald* (1859), 4 H. & N. 8; *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 573; *Bayley v. Great Western Railway* (1883), L. R. 26 Ch. D. 434. And cf. *Trail v. McAllister* (1891), 25 L. R. Ir. 524.]

(r) *Furius et pupillus sine tutoris auctoritate non potest incipere possidere; quia affectionem tenendi non habent, licet maxime corpore suo rem contingant; sicuti si quis dormienti aliquid in manu ponat. Sed pupillus tutore auctore incipiet possidere. Ofilus quidem et Nerva filius, etiam sine tutoris auctoritate possidere incipere posse pupillum aiunt; eam enim rem facti, non juris esse: quæ sententia recipi potest, si ejus ætatis sint ut intellectum capiant.*—Dig. 41, 2, 1, s. 3, de adq. vel amit. poss.

(s) *Is cujus colonus, aut hospes, aut quis alius iter ad fundum fecit; usus videtur itinere, vel actu, vel viâ, et ideo interdictum habebit; etiam si ignoravit cujus fundus esset, per quem iret, retinere eum servitutem.*—Dig. 43, 19, 1, s. 7, de itinere.

[User for twenty years by the tenant and occupier of clay works is sufficient to create a prescriptive title to a water-course (*Gaved v. Martyn* (1865), 19 C. B. N. S. 732); and the use of a stream from time immemorial by tin bounders,

who merely have a right by custom to work the tin, is sufficient to give a right by immemorial prescription to the owner of the land—the presumption being that the privilege was originally acquired by arrangement with the owner, as well as with the bounders. (*Ivimey v. Stocker* (1866), L. R. 1 Ch. Ap. 396.)

A tenant cannot prescribe for an easement against his landlord. The possession of the tenant is the possession of his landlord; and it is said to be a violation of first principles to suppose that the occupation of the tenant, whose occupation of close A. is the occupation of his landlord, could by that occupation acquire an easement over close B., also belonging to his landlord; the duty of the tenant being that, if he passes over close B., he should do nothing on it more than his lease authorized him to do (*Gayford v. Moffatt* (1868), L. R. 4 Ch. 133; *Daniel v. Anderson* (1862), 8 Jur. N. S. 328; *Outram v. Maude* (1881), L. R. 17 Ch. D. 391; *Macnaghten v. Baird*, [1903] 2 Ir. R. 731; *Kilgour v. Gaddes* (see below)); but a lost grant may be presumed against a landlord in favour of his tenant (*Dawson v. McGrogan*, [1903] 1 Ir. R. 92).

If close B. be in the occupation of another tenant, the tenants cannot acquire prescriptive rights, other than rights to light, against one another (*Kilgour v.*

Persons to  
whom user  
will give an  
easement.

[User under an Act of Parliament authorizing a man to use any particular easement, could not be made available to eke out a period of twenty years' enjoyment, although continued after the repeal of the Act for a sufficient number of years to make, together with the years of enjoyment under it, the period of twenty (t).]

### SECT. 3.—*Qualities of the Enjoyment.*

In order that the enjoyment, which is the quasi possession of an easement, may confer a right to it by length of time, it must have been open, peaceable, and "as of right" (u).

Nec vi, nec  
clam, nec  
precario.

The effect of the enjoyment being to raise the presumption of a consent on the part of the owner of the servient tenement, it is obvious that no such inference of consent can be drawn, unless it be shown that he was aware of the user, and, being so, made no attempt to interfere with its exercise (x). Still less can such consent be implied, but rather the contrary, where he has contested the right to the user, or where, in consequence of such opposition, an interruption in the user has actually taken place. Even supposing these defects of the user not to exist, still the effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement, for in such a case the user would not

*Gaddees*, [1904] 1 K. B. 457; *Fear v. Morgan*, [1906] 2 Ch. 406; affd. sub nom. *Morgan v. Fear* (1907), W. N. 196.

Notwithstanding the principle that a tenant can do nothing to injure his landlord's interest, the tenant of a house in respect of which an easement of light is claimed, by taking a lease of the land in respect of which it is claimed, suspends the running of the statute. Until the whole period has elapsed the legislature gives to the owner of the house no title to damnify the neighbour's property by preventing him from doing as he pleases with it. There is nothing in the tenant's act in taking the adjacent land to prejudice the landlord's right, because the landlord had no right anterior to the lapse of twenty years. (*Ladyman v. Grave*

(1871), L. R. 6 Ch. 763.)]

(t) *Kinloch v. Nevile* (1840), 6 M. & W. 806; 55 R. R. 784. If, however, there had been a user prior to the Act, or any other evidence to show that the user by the claimant was independent of the Act, the case might be otherwise.

(u) "The sort of possession that is required to establish a prescription is the same in the civil law, the law of Jersey, and our common law," per Lord Wynford in *Benest v. Pipon* (1829), P. C. 1 Knapp, 70.

(x) ["The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant." Opinion of the judges in *Chasemore v. Richards*, cited post, Part III. Chap. I.]

have been had with the intention of acquiring or exercising a right. The presumption, however, is, that a party enjoying an easement acted under a claim of right until the contrary is shown (y).

Neo vi, nec  
clam, nec  
precario.

The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be "*nec vi, nec clam, nec precario*" (z).

The doctrine of the law of England, as cited by Lord Coke, from Bracton, exactly agrees with the civil law. The possession must be long, continuous, and peaceable. Long, that is, "during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceful, because, if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be '*longus usus nec per vim, nec clam, nec precario*'" (a). "*Transferuntur dominia sine titulo et traditione per usucaptionem, scilicet per longam, continuam et pacificam possessionem. Longa, i. e. per spatium temporis per legem definitum. Continuum dico, ita quod non sit legitime interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod prius, si contentio fuerit justa. Ut si verus dominus, statim cum intrusor vel disseissor ingressus fuerit seisinam, nitatur tales viribus repellere et expellere, licet id quod inceperit perducere non possit ad effectum, dum tamen, cum defecerit, diligens sit ad impetrandum et proseguendum. Longus usus nec per vim, nec clam, nec precario, &c.*" (b).

The enjoyment must be peaceable.

Nec vi.

At common law any acts of interruption or opposition from which a jury might infer that the enjoyment was not rightful, were sufficient to defeat the effect of the enjoyment, the question being whether, under all the facts of the case, such enjoyment had been had under a concession of right.

By the statute it is enacted that nothing shall be deemed to be

(y) *Campbell v. Wilson* (1803), 3 East, 294; 7 R. R. 462.

(z) Cod. 3, 34, 1, de serv.; Dig. 8, 5, 10, si serv. vind.

(a) Co. Litt. 113, b; Bracton, lib. 2, f. 51 b, 52 a, 222 b.

(b) ["These words, 'as of right,'

occur in sect. 5 of 2 & 3 Will. 4, c. 71. There has been much difficulty as to their construction, but it seems clear that if the enjoyment has been clandestine, contentious, or by sufferance, it is not of right." Per Erle, J., 17 Q. B. 275. This, as already shown, is subject to one exception. See ante, p. 201, note.]



Neo vi.

an interruption, unless it shall be submitted to or acquiesced in for the space of a year after the party interrupted shall have notice thereof, and of the person making or authorizing the same (c).

It is certainly by no means clear what the precise intention of the legislature was; but it appears hardly possible that it should have been intended to confer a right by user during the prescribed period, however "contentious" or "litigious" such user may have been (d). In the case of *Bailey v. Appleyard* (e), where a right of way was claimed, the use of which had been materially obstructed by a "stang," Patteson, J., left the question to the jury "whether the stang had prevented the exercise of the right" (f).

[An act of partial interruption, instead of destroying the easement claimed, may qualify it, and be evidence of another easement. Thus, where a weir across a river was claimed by prescription, and a miller, whose mill was on its banks, had caused a fender to be

(c) See ante, p. 206.

(d) See *Wright v. Williams* (1836), 1 M. & W. 100; 46 R. R. 265; [*Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B. 267; 85 R. R. 455; *Glover v. Coleman* (1874), L. R. 10 C. P. 108; and per Bowen, J., in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 786.]

(e) (1838), 3 Nev. & P. 257; 47 R. R. 537; S. C. 8 A. & E. 161, and corrected in a note in the same volume.

(f) The report of the case of *Bailey v. Appleyard* was first published in 3 N. & P. 257; it afterwards appeared in 8 Ad. & El. 161. On the case, as it appeared in these reports, the following observation was made in the first edition of this work. "In the recent case of *Bailey v. Appleyard*, the erection of a rail by the owner of the servient tenement within the shorter period of the statutory prescription was held sufficient to prevent the acquisition of the right; and it was decided that it was incumbent on the plaintiff to prove an enjoyment not interrupted, every interruption being presumed to be hostile until the contrary was shown. It does not appear from the report that in this instance the interruption was acquiesced in, or even continued for a year." In the 8th volume of Adolphus and Ellis, the reporters, after adverting to the appearance of the above passage, give the following very important correction of the report of the case. "The learned judge who tried the cause of

*Bailey v. Appleyard* has favoured the reporters with a note of the facts proved before him, from which it appears that the report of the case, above referred to, and that in the present volume (p. 161), are incorrect in representing that on the trial any question ultimately turned upon an interruption within thirty years.

"The plaintiff endeavoured to show that the tenant of Upper House Farm (in respect of which the plaintiff claimed) had for more than thirty years pastured his cattle in Toadholes Lane as far as a close called Potover Lane, but it was proved that a stang, or rail, sufficient to prevent cattle from passing, had been erected across Toadholes Lane, between Upper House Farm and Potover Lane. *It did not appear when the stang was put up*; but it had stood much more than two years before its removal in 1809. A neighbouring proprietor had been accustomed to turn his cattle into Toadholes Lane from the Potover Lane end; and the stang obstructed the passage of his cattle towards Upper House Farm, as well as the passage of cattle from Upper House Farm into the part of Toadholes Lane between the stang and Potover Lane. By agreement between the two proprietors in 1809, a gate was put up at the end of Potover Lane; the stang was then removed; and from that time the cattle of the plaintiff's predecessor depastured the whole of Toadholes Lane up to the gate. The

[shut down, the Court held this not fatal to the claimant's right, thinking that there was nothing to prevent a second easement being acquired, as subordinate to that already existing, if the subject-matter admitted of it (*g*).]

Nec vi.

By the civil law any enjoyment was said to be forcible to which opposition was offered, either by word or deed, by the owner of the servient tenement (*h*).

The enjoyment must be open.

Nec clam.

The user of an easement may be secret, either from the mode in which a party enjoys it, or from the nature of the easement itself.

Instances of the former kind are where the right is exercised by stealth, or in the night (*i*).

Instances of the latter kind occur where a claim is made to an extraordinary degree of support to a house from the neighbouring soil, in consequence of an excavation on the party's own land (*k*), [or a peculiarity in the internal structure of the house (*l*),] not visible to the neighbour.

plaintiff's counsel argued that the stang was not necessarily an interruption of the plaintiff's enjoyment of pasture over the locus in quo; and that, if it was not, the evidence showed an enjoyment of many years before 1809. The learned judge left it to the jury to say whether the stang had prevented the exercise of the right. Verdict for the defendant.

"No question, therefore, at the trial, turned on the effect of an interruption; but, if the stang was erected adversely to the right insisted on by the plaintiff, he failed in proving a thirty years' enjoyment, because the evidence, as far as it went, showed that the enjoyment, as claimed, had not begun till 1809, and the plaintiff had been excluded, and not interrupted, during the first two years of the thirty. And even if it had appeared that the stang ought to have been treated as an 'interruption,' it was plain that it had existed and been acquiesced in for more than a year. On the motion, reported ante, the term 'interruption' was used; but it was evidently unnecessary, for the purpose of the decision, to employ it in any other sense than that of obstruction."

(*g*) *Roll v. Whyte* (1868), L. R. 3 Q. B. 302; for a like decision, see *Goodman v. Mayor of Saltash* (1882), L. R. 7 App. Cas. 633.

(*h*) Vi factum videri, Quintus Mucius

scripsit, si quis contra quam prohiberetur, fecerit: et mihi videtur plena esse Quinti Mucii definitio. Sed et si quis jactu vel minimi lapilli prohibitus facere, perseveravit facere: hunc quoque vi fecisse videri, Pædus et Pomponius scribunt, eoque jure utimur.—Dig. 43, 24, 1, s. 5, 6, quod vi aut clam.

Prohibitus autem intelligitur, quolibet prohibentis actu: id est vel dicentis se prohibere, vel manum opponentis, lapillumve jactantis prohibendi gratiâ.—Ibid. par 20, s. 1.

(*i*) Itaque clam nancisoitur possessionem, qui futuram controversiam metuens, ignorante eo, quem metuit, furtive in possessionem ingreditur.—Dig. 41, 2, 6, de adq. vel. amit. poss.

Talis usus non valebit, cum sit clandestinus, et idem erit si nocturnus.—Bracton, lib. 2, f. 52 b.

Aut in absentia domini.—Ibid. Lib. 4, f. 221 a.

See *Dawson v. Duke of Norfolk* (1815), 1 Price, 246; 16 R. R. 708; [and, as to the case of a bailiff claiming a right by user over his master's property, *Officers of State v. Earl of Haddington*, 5 Wils. & Shaw, Sc. App. 570].

(*k*) *Partridge v. Scott* (1838), 3 M. & W. 229.

(*l*) *Angus v. Dillon* (1878), L. R. 4 Q. B. Div. 162; see per Thesiger, L. J., at pp. 181—3, and per Cotton, L. J., at

Nec clam.

A consideration of this rule would, it appears, afford an answer in the affirmative to the question incidentally raised in the case of *Dodd v. Holme* (n)—whether, in order to acquire a right to support for a house by antiquity of possession, it must originally have been built with that degree of strength and coherence which may reasonably be expected to be found in a well-built house,—for as there might be nothing in the external appearance of the house to give notice to the owner of the adjoining land that the weakness with which it was built caused it to require a greater degree of support from his soil than a well-built house would have required, and quoad such additional support the enjoyment would have been secret, no presumption of a grant of it on his part could be implied.

The same reasoning would also apply to the case of an ancient house, originally well-built, becoming weaker from the want of proper repair. A man believing there were no minerals on his own land might be willing to subject it to the easement of support to a well-built house, which would diminish the value of his property only in the event of his wishing to mine in it, although he would refuse to restrict himself from digging a foundation for any building he might require; which would possibly be the case were he bound to afford the support necessary to sustain a rickety and ill-built edifice.

[There is also the case of a house originally requiring no more than an ordinary degree of support, but subsequently altered so as to require an unusual amount of lateral pressure to support it. But here, it seems that, if the alteration be openly and honestly made, the servient owner is fixed with notice that an additional burden of some kind is being imposed upon his tenement, and, if he makes no inquiry, will in time become subject to the obligation of increased support (o).]

p. 187. The defendants elected not to take a new trial, so that the decision on this point of the Court of Appeal was not, strictly speaking, open to review by the House of Lords; but the point was referred to on the appeal: see L. R. 6 App. Cas. at pp. 751 (Pollock, B.), 757 and 760 (Field, J.), 766 and 767 (Lindley, L. J.), 777 and 779 (Fry, J.), 787 and 789 (Bowen, J.), 801 (Lord Selborne, C.), 807 (Lord Penzance), 827

and 828 (Lord Blackburn). See also *Union Lighterage Co. v. London Graving Dock Co.*, [1901] 2 Ch. 300; affd., [1902] 2 Ch. 557; and *Gately v. Martin*, [1900] 2 Ir. R. 269.

(n) (1834), 1 A. & E. 493; 3 Nev. & Mau. 739; 40 R. R. 344.

(o) *Dalton v. Angus* (1881), L. R. 6 App. Cas. 740, per Lord Selborne, at p. 801.

This reasoning also applies to the claim of [an extraordinary degree of] support from adjoining houses (*p*). Nec clam.

By the civil law it was sufficient to vitiate the user, if, from the acts of the party, an intention of concealment could be inferred (*q*). This intention might be deduced from the manner in which the act was done, and the Digest contains a variety of instances in which such an intention was inferred from the facts (*r*).

The enjoyment must be as of right (*s*). Nec precario.

Enjoyment had under a licence or permission from the owner of the servient tenement, as has been already remarked, confers no right to the easement. Each renewal of the licence rebuts the presumption which would otherwise arise, that such enjoyment was had under a claim of right to the easement (*t*).

Any admission, whether verbal or otherwise, that the enjoyment had been had by permission of the owner of the servient tenement, was sufficient, before the [Prescription Act], to prevent the acquisition of the right, however long such enjoyment might have continued. "Si autem," says Bracton, "(seisina) precaria fuerit et de gratiâ, quæ tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus" (*u*).

By the statute a distinction is made as to the effect of a parol licence in those cases in which the right is declared to be absolute and indefeasible, and those in which there is no such provision. In

(*p*) See per Bramwell, B., in the case of *Solomon v. Tintners' Co.* (1859), 4 H. & N. 601, acc. [In *Angus v. Dalton*, Cockburn, C. J., appears to have considered that the very possibility of acquiring any prescriptive right to support was excluded by the secrecy of the enjoyment (L. R. 3 Q. B. D. at p. 117); but this opinion was negatived by the Court of Appeal and the House of Lords.]

(*q*) Idem Aristo putat, eum quoque clam facere, qui celandi animo habet eum, quem prohibeturum se intellegit, et id existimat, aut existimare debet, se prohibitum iri.—Dig. 43, 24, 3, § 8, quod vi aut clam.

(*r*) Dig. 43, 24, 3, §§ 7, 8, quod vi aut clam.

(*s*) [See the question discussed in *Burrows v. Lang*, [1901] 2 Ch. 502, at p. 510 et seq.]

(*t*) *Monmouthshire Canal Co. v. Harford* (1834), 1 C. M. & R. 614; 40 R. R. 648; [Tone v. Preston (1883), L. R. 24

Ch. D. 739; *Chamber Colliery Co. v. Hopwood* (1886), L. R. 32 Ch. Div. 549; *Gardner v. Hodgson's Kingston Brewery Co.*, [1901] 2 Ch. 198; affd., [1903] A. C. 229. As to precarious enjoyment of a different kind, see *Arkwright v. Gell* and the other cases quoted below, Part III. Chap. I., ad fin.

If the enjoyment commenced by permission, it is a question for the jury whether it did not continue by permission. *Gaved v. Martyn* (1865), 19 C. B. N. S. 732.

The fact that a gate, through which a right of way was claimed, had always been kept locked, the key having been kept by the proprietor of the servient tenement, but always having been asked for by the proprietor of the dominant tenement as a matter of right, when it was required, and never having been refused, did not prevent the acquisition, by prescription, of the easement. *Roberts v. Fellowes* (1906), 94 L. T. 279.]

(*u*) Lib. 4, f. 221 a.

Nec precario. the former instance, although the enjoyment commenced by permission, yet after it has continued during the requisite period (forty years in general, and twenty in the case of lights), the right cannot be invalidated, except by proof that the easement "was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing" (z). The latter case is not affected by the statute.

The "precarious enjoyment" of the Civil Law, by which, as has been already seen, no prescriptive right could be acquired, is identical with the permissive enjoyment of the English law (a).

Unity of  
possession.

For the same reason, that the enjoyment must be such as to afford evidence of the acknowledgment of the right to an easement, as such, by the owner of the servient tenement, no right is acquired by the enjoyment of an easement which has been had during the time of a unity of possession of the dominant and servient tenements; and it was decided in [some of the earlier cases on the Prescription Act (b)], that, in computing the period of twenty years' enjoyment "next before the action brought," under the statute, not only must the times during which the unity continued be excluded, but that the operation of the unity is to suspend the process of acquisition while it lasts, and to destroy altogether the effect of the previous user, by breaking the continuity of the enjoyment.

Interruption  
by servient  
owner under  
the statute.

A claim under the statute to an easement by enjoyment during the periods therein specified may be conclusively rebutted, and the user shown not to have been as of right, by evidence of a breach of the continuity of possession by an act of interruption on the part of the servient owner acquiesced in for a year after notice (sect. 4) (c); [and so it may by evidence of repeated interruptions of less than a

(z) [The effect of the statute is that in the case of the longer periods, a right may be acquired by an enjoyment which at the common law would have been had as "a precarious enjoyment," see ante, p. 201, note (i). The whole matter is explained in *Tickle v. Brown* (1836), 4 A. & E. 369; 43 R. R. 358.]

(c) Precarium est, quod precibus petenti utendum conceditur (tamdiu) quamdiu is, qui concessit, patitur.—Dig. 43, 26, 1, de precario.

Veluti si me precario rogaveris, ut per fundum meum ire, vel agere tibi liceat: vel ut in tectum vel in aream sedium

meorum stillicidium vel tignum in parietem immisum habeas.—Ibid. L. 5.

(b) *Onley v. Gardiner* (1838), 4 M. & W. 496; *Clayton v. Corby* (1842), 2 G. & D. 183; 57 R. R. 807; *Battishill v. Red* (1856), 13 C. B. 696. See *Ladyman v. Grave* (1871), L. R. 6 Ch. 763; *Ecclesiastical Commissioners v. Kino* (1880), L. R. 14 Ch. Div. 213; *Hollins v. Verney* (1884), L. R. 13 Q. B. Div. 304. But *Onley v. Gardiner* and *Battishill v. Red* were followed in *Damper v. Bassett*, [1901] 2 Ch. 350.

(c) [See ante, p. 206.]

[year, if they be sufficient to show that the enjoyment was continuous (d)].

Interruption  
by servient  
owner under  
the statute.

In delivering the judgment of the Court of Exchequer, in *Bright v. Walker*, in which the qualities of an enjoyment necessary to clothe it with right by lapse of time were considered, Baron Parke said (e): "In order to establish a right of way, and to bring the case within this section (2nd), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right;' for that is the form in which, by sect. 5, such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a licence, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised."

The authority of this case, and the doctrines laid down by the Court in it, were fully recognized in *The Monmouthshire Canal Company v. Harford* (f), and *Tickle v. Brown* (g).

[The enjoyment must be definite in its character (h).

Enjoyment to  
be definite.

"Non-user which would not be sufficient to establish an abandon-

(d) *Eaton v. Swansea Waterworks Co.* (1851), 17 Q. B. 267; 85 R. R. 455; and per Bowen, J., in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 786.

(e) 1 C. M. & R. 219; 40 R. R. 536, Preface VI.

(f) (1834), 1 C. M. & R. 614; 40 R. R. 648.

(g) (1836), 4 A. & E. 369; 43 R. R.

358; [cf. *Winship v. Hudspeth* (1854), 10 Exch. 5].

(h) No alteration in the dominant building, which would not involve the loss of a right to light when indefeasibly acquired (see post, pp. 528, 549), will, if made during the currency of the period prescribed by the Prescription Act, prevent the acquisition of the right. (*Andrews v. Waite*, [1907] 2 Ch. 500.)

Enjoyment to be definite. [ment of a right acquired may be enough to prevent the acquisition of that right under the (Prescription) Act" (i).

It must not be so casual and uncertain as to be out of the category of known easements (j).

Capable of interruption. Lastly, the enjoyment must be physically capable of interruption (k).

In the leading case of *Angus v. Dalton* (l), Cockburn, C. J., and Mellor, J., gave judgment against a claim of lateral support for buildings, partly upon the ground that the enjoyment of such support cannot be resisted by the adjoining owner by any means short of an excavation which may be destructive of his own tenement (m). But the majority of the Court of Appeal, while conceding that an enjoyment physically incapable of interruption would confer no right (n), held that the decided cases prevented them from applying the principle to the easement in question (o); and their decision was upheld by the House of Lords.

"The power of resistance," said Lord Selborne (p), "does and must in all such cases exist, otherwise no question like the present could arise. It is true that in some cases (of which the present is an example) a man acting with reasonable regard to his own interest, would never exercise it for the mere purpose of preventing his neighbour from enlarging or extending such a servitude. But on the other hand, it would not be reasonably consistent with the policy of the law in favour of possessory titles, that they should depend in each particular case upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them. They can always be interrupted (and that without difficulty or inconvenience) when a man wishes, and finds it for his interest, to make such a use of his own land as will have that effect. So

(i) *Smith v. Baxter*, [1900] 2 Ch. 138; per Stirling, J., at p. 146.

(j) *Webb v. Bird* (1863), 13 C. B. N. S. 841; *Chasemore v. Richards* (1859), 17 H. & C. 349; *Roberts v. Fellowes* (1906), 94 L. T. 279; and per Thesiger, L. J., in *Angus v. Dalton* (1878), L. R. 4 Q. B. Div. at p. 175.

(k) *Webb v. Bird*, ubi sup.; *Sturges v. Bridgman* (1879), L. R. 11 Ch. Div. 852.

(l) (1877-81), L. R. 3 Q. B. D. 86; 4 Q. B. Div. 162; 6 App. Cas. 740; see above, p. 194.

(m) L. R. 3 Q. B. D. at pp. 117, 125 ff.

(n) L. R. 4 Q. B. Div. at p. 175.

(o) Ibid. pp. 176 to 181.

(p) L. R. 6 App. Cas. at p. 796. Some of the judges even hinted that the enjoyment of lateral support was capable of being resisted by the simple method of bringing an action for trespass; and Lord Selborne appears to have concurred in this view, without making it the basis of his judgment. See per Lindley and Bowen, J.J., at pp. 763, 784, and the contrary opinion of Fry, J., at p. 775; Lord Selborne's opinion on this point is reported on p. 793, and Lord Watson's on p. 831. See below, Part III. Chap. IV.

[long as it does not suit his purpose and his interest to do this, the law which allows a servitude to be established or enlarged by long and open enjoyment, against one whose preponderating interest it has been to be passive during the whole time necessary for its acquisition, seems more reasonable, and more consistent with public convenience and natural equity, than one which would enable him, at any distance of time (whenever his views of his own interest may have undergone a change), to destroy the fruits of his neighbour's diligence, industry, and expenditure.]

Capable of  
interruption.

Lord Penzance concurred in the judgment, feeling himself bound by previous decisions; but his own opinion was that the enjoyment must, in order to confer a right, be capable of interruption "without extravagant and unreasonable loss or expense" (q).]

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(q) L. R. 6 App. Cas. at p. 805. The opinions of the judges on this point will be found reported on pp. 749 (Pollock,

B.), 764 (Lindley, J.), 774 (Fry, J.), and 785 (Bowen, J.).



## PART III.

### OF PARTICULAR EASEMENTS AND PARTICULAR NATURAL RIGHTS OF A SIMILAR CHARACTER.

#### CHAPTER I.

##### RIGHTS TO WATER.

RUNNING water is the subject of easements of several kinds. The right to receive a flow of water in a natural stream, and transmit it in its accustomed course, is an ordinary right of property—a natural right: the right to interfere with the accustomed course, either by penning it back upon the land above, or transmitting it altered in quality or quantity to an extent not justified by natural right, is an easement.

The right to have a natural stream run in its accustomed course does not arise by prescription, but “*jure naturæ*,” and of common right as an ordinary incident of property; the right to interfere with this natural course, by altering the quality or quantity of the water, is an easement, and is claimable by prescription.

No prescrip-  
tion against  
prescription.

“When a man has a lawful easement or profit by prescription, from time whereof, &c., another custom, which is also from time whereof, &c., cannot take it away; for the one custom is as ancient as the other; as if one has a way over the land of A. to his freehold by prescription, from time whereof, &c., A. cannot allege a prescription or custom to stop the said way” (a).

The difficulty here suggested does not arise with regard to a natural stream, the right to the flow of it not arising by prescription; and if a man declares for a disturbance of the course of a stream, it is a good plea to justify the diversion in virtue of an easement so to do.

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(a) *Aldred's Case* (1611), 9 Rep. 58 b.

Bracton appears to consider the obligation to respect the natural course of a flowing stream as a duty imposed by law; and that, unless justified by an easement, a man has no more right to divert the course of a stream than to discharge water upon his neighbour's land: "Item a jure imponitur servitus prædio vicinorum; scilicet ne quis stagnum suum altius tollat, per quod tenementum vicini submergatur. Item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte" (b).

Natural rights and acquired easements in running water.

In the Courts of the United States, which recognize and profess to be guided by the principles of the English law, this point has received much consideration. In an elaborate judgment of Mr. Justice Story, the right to have a stream flow on in its accustomed course is laid down to be a right universally incident to the property in the adjoining land, a right which can only be interfered with by the acquisition of an easement; and the ordinary rights of the owners of the adjacent land to the natural flow of the stream are distinguished with great precision from the acquisitions in derogation of the common rights made by an exclusive appropriation of the water.

Tyler v. Wilkinson.

"Prima facie (c), every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, ad medium filum aquæ (d).

Judgment of Story, J.

"In virtue of this ownership (e) he has a right to the use of the

(b) Bracton, lib 4, f. 221 a.

(c) Tyler v. Wilkinson, 4 Mason, U. S. R. 397.

(d) [See Bickett v. Morris (1866), L. R. 1 H. L. Sc. 47; Mayor and Corporation of Carlisle v. Graham (1869), L. R. 4 Exch. 361; Earl of Zetland v. The Glorier Incorporation of Perth (1870), L. R. 2 H. L. Sc. 70; Palmer v. Perse (1878), L. R. 11 Eq. 616; 26 W. R. Dig. 259; Orr-Ewing v. Colquhoun (1877), L. R. 2 App. Cas. 849; Micklethwait v. Newlay Bridge Co. (1886), L. R. 33 Ch. Div. 133; Duke of Devonshire v. Pattinson (1887), L. R. 20 Q. B. Div. 263; Tilbury v. Silva (1890), L. R. 45 Ch. Div. 98; Hindson v. Ashby, [1896] 2 Ch. 1; Great Torrington Commons Conservators v. Moore Stevens, [1904] 1 Ch. 347; cf. with case last cited, Menzies v. Breadalbane (No. 1), 4 F. 55; Mews'

Digest (1902), col. 321. As to an enclosure award, see Ecroyd v. Conlthard, [1897] 2 Ch. 554; affd. [1898] 2 Ch. 358.

(e) [In Lord v. Commissioners of City of Sidney (1859), 12 Moo. P. C. 473, it was argued that a riparian owner who, by express words in the conveyance to him, is excluded from the ownership of the bed of the stream ad medium filum aquæ (which, in the absence of such words, is prima facie included) does not possess the rights of a riparian proprietor to the water of the stream. No express decision was pronounced as to this, the claimant being held entitled to the bed; but their lordships said that they did not accede to the argument. Cf. Lyon v. Fishmongers' Co. (1876), L. R. 1 App. Cas. 662. "Lateral contact is as good as vertical." North Shore Rail. Co. v. Pion (1889), L. R. 14 A. C. 612.

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water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors, or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *sic utere tuo ut alienum non lædas*.

In the case of a navigable river where the tide flows and reflows, the soil in the channel belongs to the Crown (*Com. Dig. art. Navigation A. : Gann v. Fishers of Whitstabl.* (1865), 11 H. of L. 207), in the absence of evidence to the contrary (*Att.-Gen. v. Emerson*, [1891] A. C. 649); but there may nevertheless be exclusive rights in the riparian owners. See *Att.-Gen. v. Earl of Lons-*

*dale* (1868), L. R. 7 Eq. 397; *Lyon v. Fishmongers' Co.*, ubi sup.; *Original Hartlepool Collieries Co. v. Gibb* (1877), L. R. 5 Ch. D. 713; *Bell v. Corporation of Quebec* (1879), 5 App. Cas. 84; *Fritz v. Hobson* (1880), 14 Ch. D. 542. In America it has been held that a mere intruder on land has no riparian rights. *Watkins v. Holman*, 16 Pet. (U.S.) 25. Sed qu.]

"But of a thing common by nature, there may be an appropriation by general consent or grant. Mere priority of occupation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land; and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law. Now this may be either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say of a grant or right—for I very much doubt whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant—is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law.

Judgment of  
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"With these two principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they had no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills; that is, their rights are to be measured by the extent of their natural appropriation and use of the water for a period, which the law deems a conclusive presumption in favour in rights of this nature. In their character as millowners, they have no title to the flow of the stream beyond the water actually and legally appropriated by the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, as far as it has not been already acquired by some prior and legally operative appropriation.

G.

Judgment of  
Story, J.

"No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow those rights, to establish, by competent proof, their own title to divert and use the stream."

Natural and  
acquired  
rights in run-  
ning water.

As an easement is something superadded to the ordinary rights of property, and it is incumbent on the claimant thus seeking to cast a burthen upon his neighbour to prove his title to it, it is evidently essential, in order to determine in what manner and what amount of evidence shall be given to support the title, to ascertain strictly what are the bounds of the ordinary rights of property, and where the right claimed assumes that accessorial character which trenches upon the liberty of another. Thus, with reference to the question above alluded to, it becomes important to consider whether the right to receive the water is one of the ordinary incidents of the ownership of the soil, or an additional right claimed as an easement.

In discussing this question, a misconception appears to have taken place; the right to the corporeal thing, water itself, has been confounded with the incorporeal right to have the stream flow in its accustomed manner (*f*). Upon this a further error was founded—that the first appropriator of water had a right to continue to divert the stream to the extent of such appropriation, no matter how injurious such diversion might be to the rights of parties who should afterwards seek to use the stream.

The question has been much debated—what nature of property existed by law, or could exist, in air, light, and water. It has been attempted to rest that right to the enjoyment of these elements upon the first occupancy of a common right. Thus, Blackstone, in his chapter on "Title by Occupancy," after remarking that a property in goods and chattels might be acquired by occupancy—"the original and only primitive method of acquiring any property at all"—lays it down, that, "the benefit of the elements—light, air, and water—can only be appropriated by occupancy. If I have an ancient window overlooking my neighbour's ground, he may not erect any blind to

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(*f*) *Mason v. Hill* (1833), 5 B. & Adol. 19; 2 Nev. & M. 747; 39 R. R. 354.

obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall, for there the first occupancy is rather in him than in me. If my neighbour makes a tanyard, so as to annoy, and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbour's prior mill or his meadow, for he hath, by the first occupancy, acquired a property in the current" (g).

Natural and  
acquired  
rights in run-  
ning water.

The last two illustrations appear to be incorrect, and directly at variance with the later decisions upon this subject (h).

Even if it were conceded that these elements are, by the law of England, still in common and subject to be made property by occupancy, analogy to the rules which govern the acquisition of property by this means points out, that the appropriation of a particular portion could give no right of property in more than that portion. The abstraction of a measure of water from a flowing stream to-day, can give no property in water which may possibly hereafter form part of the stream, but which is now on the mountains. The present reception of light by a window cannot give a prospective property in the light itself, which will pass through the window to-morrow, and which has not yet emanated from the sun.

The right principle to be collected from the authorities is, [that "the right to have a stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; that flowing water is *publici juris*, not in the sense that it is a *bonum vacans* to which the first occupant may acquire an exclusive right, but in this sense only, that all may reasonably use it who have a right of access to it; that none can (i) have any property in the water itself, except in the particular portion which he may think proper to abstract from the stream and take into his possession, and that during the

Result of  
authorities.

(g) 2 Black. Com. 402.

(h) *Bliss v. Hall* (1838), 4 Bing. N. C. 183; 6 Scott, 500; 44 R. R. 697, post; *Mason v. Hill* (1833), 3 B. & Ad. 304, 5 B. & Ad. 1; 39 R. R. 364; [*Sturges v.*

*Bridgman* (1878), L. R. 11 Ch. Div. 852; see post, Part III. Chap. V.]

(i) Except by virtue of some statute. See *Proprietors of Medway v. Earl of Romney* (1861), 9 C. B. N. S. 575.

Result of  
authorities.

[time of his possession only; that each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it (k), and that this right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state, but is a right only to the flow of the water and the enjoyment of it, subject to the similar natural right of all the proprietors of the banks on each side to the reasonable enjoyment of the same stream; that it is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; but that for such an use it will, even though there may be no *actual* damage to the plaintiff" (l); and that, if the user by the riparian owner goes beyond his natural right, it matters not how much the plaintiff (whose natural right is affected by such user) has used the water, or *whether he has ever used it at all*; in either case his right is equally invaded, and an action is maintainable (m).

*Miner v.*  
*Gilmour.*

In *Miner v. Gilmour* (n), Lord Kingsdown, delivering judgment on an appeal from Lower Canada, after stating that there was no distinction between the English law and that applicable to the case before their lordships, said, "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill (o), or divert the water for the purpose of irrigation; but he

(k) I.e., to the reasonable use of the stream for ordinary purposes, e.g., for his domestic purposes and his cattle (*Miner v. Gilmour*, cited in text, above), but not for purposes foreign to or unconnected with his riparian tenement. *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301; cited post, p. 247.

(l) *Embrey v. Owen* (1851), 6 Exch. 369; 86 R. R. 331.

(m) See judgment in *Sampson v. Hod-*

*dinott* (1857), 1 C. B. N. S. 611; see also 3 Kent's Commentaries, 439-445, quoted in the judgment in *Embrey v. Owen*, ubi sup.

(n) (1858), 12 Moore, P. C. 156. [Cf. as to the Roman-Dutch law, *Van Breda v. Silberbauer* (1869), L. R. 3 P. C. 84; *Commissioners of French Hoek v. Hugo* (1885), L. R. 10 A. C. 336.]

(o) *White v. White*, [1906] A. C. 72, per Lord Halsbury, at p. 80.

[has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.”

*Miner v.  
Gilmour.*

In *Lord Norbury v. Kitchin* (p), Martin, B., in his direction to the jury, quoted this passage as containing the law on the subject, and ruled that the riparian proprietor could only take the water for a purpose of utility, and not to make an ornamental pond. The plaintiff's counsel moved for a new trial, on the ground that the dictum of Lord Kingsdown stated the right of a riparian proprietor too extensively. The Court did not decide that the right had been correctly stated, but discharged the rule on the ground that the defendant had not taken an unreasonable quantity of water. The stream sent down 333,000 gallons a day, and the defendant abstracted from 8,000 to 9,000.

*Lord Norbury  
v. Kitchin.*

In *Nuttall v. Bracewell* (q), Martin, B., says, “The law has been supposed to be well settled, and in my opinion is nowhere more clearly stated than by Lord Kingsdown in *Miner v. Gilmour*.” And he cites the above passage, and says that there is no doubt that it is the law. And Channell, B., delivering the judgment of Pollock, C. B., and himself (p. 13), says, “I quite agree that the passage quoted by my brother Martin from Lord Kingsdown's judgment very clearly, as well as accurately, states the law applicable to running streams.”

*Nuttall v.  
Bracewell.*

In *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (r), the appellants, being riparian owners on the banks of a stream, claimed the right to collect the water of the stream into a permanent reservoir for the supply of an adjacent town; it was held that this was not a reasonable use of the water within the meaning of the above rules. “Undoubtedly,” said Lord Cairns, L. C., “the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water. That is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But, further, there are uses no doubt to which the water may be put by the upper owner, namely, uses

*Swindon  
Waterworks  
Co. v. Wilts  
and Berks  
Canal Co.*

(p) (1863), 3 F. & F. 292; 9 Jur., N. S. 132.

(q) (1866), L. R. 2 Exch. 9.

(r) (1875), L. R. 7 H. L. 697.



*Swindon  
Waterworks  
Co. v. Wilts  
and Berks  
Canal Co.*

[connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable one. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water.

“But, my lords, I think your lordships will find that, in the present case, you have no difficulty in saying whether the use which has been made of the water by the upper owner comes under the range of those authorities which deal with cases such as I have supposed, cases of irrigation and cases of manufacture. Those were cases where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use which they claim the right to make of it, is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream—as great a diversion as if they had changed the entire watershed of the country, and, in place of allowing the stream to flow towards the south, had altered it near its source, so as to make it flow towards the north. My lords, that is not a user of the stream which could be called a reasonable user by the upper owner. It is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes—and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties, who have no connection whatever with any part of the stream.”

[In *McCartney v. Londonderry and Lough Swilly Rail. Co., Ltd.* (\*), *McCartney v. Londonderry, &c. Rail. Co.* a railway line belonging to the respondents crossed a natural stream, and at the point of crossing abutted upon the stream for about eight feet on each side. The respondents inserted a pipe into the stream at the crossing, and by means of this pipe, which was laid along the strip of railway line, diverted water to other land belonging to them, about half a mile from the stream, and there consumed it in working their locomotive engines. The appellant, who was a lower riparian owner upon the stream, stopped the pipe, and thereupon the respondents brought their action for a declaration of their right to take the water through the pipe, and for an injunction. It was held, however, that the appellant was justified in the course taken by him, and the action failed.

Lord Halsbury, L. C., in the course of his speech, referred to Lord Cairns' judgment in the *Swindon Case* as having "settled and almost codified the law upon the subject."

The following passage occurs in the speech of Lord Macnaghten: "There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all.

"Now it seems to me that the first question your lordships have to consider is, Under what category does the proposed user of the railway company fall? Certainly it is not the ordinary or primary use of a flowing stream, nor is it, I think, one of those extraordinary uses connected with or incidental to a

(\*) [1904] A. C. 301, overruling *Earl of Sandwich v. Great Northern Railway* (1878), L. R. 10 Ch. D. 707; cf. *Orr-Ewing v. Colquhoun* (1877), L. R. 2 App. Cas. 839, 856; *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1878), L. R. 4 App. Cas. 121; *Roberts v. Richards* (1882), 50 L. J. Ch. 297;

compromised on appeal, 51 L. J. Ch. 944; W. N. 1881, p. 156; *Ormerod v. Todmorden Mill Co.* (1883), L. R. 11 Q. B. Div. 155; *Kensit v. Great Eastern Railway* (1884), L. R. 27 Ch. Div. 122; *Roberts v. Gwyrfai District Council*, [1899] 1 Ch. 583; [1899] 2 Ch. 608.

*McCartney v.  
Londonderry,  
&c. Rail. Co.*

[riparian tenement which are permissible under certain conditions. In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower riparian owner can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."]

Whether act  
of perception  
required.

It was formerly made a question whether the simple fact of the water running in a natural channel to and through land, is sufficient to confer upon the owner of it this right to prevent his neighbour's interference, or whether there must be some more direct and tangible perception of the benefit of the water; and if so, whether a single act of such perception is sufficient, or whether such perception of benefit must be continued and repeated during such a period of time as would be requisite in general to confer an easement; and whether the act, or acts, of perception give a right to claim the benefit of the entire stream, or to such an extent only as may be sufficient to continue the enjoyment already had. Whether, for instance, if a stream runs through the lands of two neighbouring proprietors, that, per se, gives the right to the owner of the lower land to have the stream flow on without interruption, and, consequently, to maintain an action against the proprietor above for any diversion of the water by him; or whether it is necessary that he must previously have used the water, as by means of a mill, or in some similar manner; whether such usage must have subsisted for the time required to give an easement; and whether, if such mill requires only one half the usual supply of water of the stream, he can maintain an action for any diversion of the stream so long as sufficient water is left to turn his mill.

Even the earlier authorities seem clearly to have settled, that, if the stream be of sufficient antiquity, a single act of perception of the benefit of it is enough to give a right to the owner of the land to insist upon the stream running on in its accustomed course; at all events to such an extent as may be necessary for

the continuance of such enjoyment (*t*). And, although it was not then settled that the right to the flow of water in a natural stream does not depend upon antiquity of enjoyment, but is an ordinary right of property, yet, even in that state of the authorities, it is not easy to see how, if the mere antiquity of the stream, unaccompanied by proof of user, would not give rise to a presumption of right, a single act of perception could have been supposed to give any additional force to the evidence, so as to make it afford such a presumption. The author observed in the second edition of this work that this would seem to show that the right to the flow of water is quite independent of any such act of perception; and it has since been so held. Thus, although it is a well-known rule of law, that an action on the case cannot be maintained for a tortious act unless the plaintiff shows some actual damage resulting from such act to himself (*u*), and although there is authority in the books to the effect that it is incumbent on the party complaining of the diversion of a stream, to show that he has sustained some damage thereby (*x*), and that he has already applied the stream to some useful purpose with which the diversion interferes; yet this cannot now be considered as law according to the recent authorities, in which it is decided, that every proprietor of land along the stream has, without ever having used the water, a right to maintain an action against any person who diverts it, unless the person so diverting it has acquired a legal title to do so, if the diversion diminishes the flow of water to an extent greater than that necessarily incident to the reasonable use of the water by the proprietor above in the exercise of his similar right. For instance, if a person erects a mill, and thereby interferes with the course of the stream to such an extent, he is liable to an action for such diversion at the suit of any proprietor of land lying lower down the stream, although the latter has never applied the water to a beneficial purpose, and brings an action only one day before the time requisite to give the owner of the mill a prescriptive right to a use of the water exceeding the natural right. And it is enough for the plaintiff, without showing actual damage, to show an injury to his right to have the flow of

Whether act  
of perception  
necessary.

(*t*) *Bealey v. Shaw* (1805), 6 East, 208; 8 R. R. 466; *Williams v. Morland* (1824), 2 B. & C. 910; 4 Dowl. & R. 583; 26 R. R. 579.

(*u*) *Mason v. Hill* (1832), 3 B. & Ad.

304; 2 Nev. & M. 747; 39 R. R. 354.

(*x*) *Williams v. Morland* (1824), 2 B. & C. 910; 4 Dowl. & R. 583; 26 R. R. 579.

Whether act  
of perception  
necessary.

the water by proof that the defendant has used more of it than he is entitled to use as a riparian owner (*y*).

If the mill, or other mode of occupation of the water, be ancient, no doubt ever existed upon the authorities as to the owner's right of action for any obstruction (*z*). And even the earlier decisions appear equally clear for the more limited proposition, "That the application of a stream to any useful purpose gives a right to have the stream run on in its accustomed course, as far, at least, as is necessary for such application." In *Cox v. Matthews* (*a*), it is said by Lord Hale: "If a man has a water-course running through his ground, and erects a mill upon it, he may bring an action for diverting the stream, and not say antiquum molendinum; and upon the evidence it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause; for otherwise he cannot justify it, though the mill be newly erected." In *Prescott v. Phillips* (*b*), Mr. Serjeant Adair ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious, and that a possession of above nineteen years, which was shown in that case, was not sufficient."

*Bealey v.  
Shaw.*

In *Bealey v. Shaw* (*c*), the mills and works of the plaintiff and defendants were situated on the banks of the river Irwell. The persons under whom the defendants claimed had an ancient weir across the stream, by means of which they had an easement to

(*y*) [See the judgments in *Embrey v. Owen* (1851), 6 Exch. 368; 86 R. R. 331; and *Sampson v. Hoddinott* (1857), 1 C. B., N. S. 611, where the action was by a reversioner: also *Wood v. Waud* (1849), 3 Exch. 772; 77 R. R. 809; *Miner v. Gilmour*, ante, p. 244; and *Crossley v. Lightowler* (1866), L. R. 3 Eq. 296; *Roberts v. Gwyrfai District Council*, [1899] 1 Ch. 583; [1899] 2 Ch. 608; *McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301; *Sharp v. Wilson* (1905), 93 L. T. 155. This principle, that no actual damage need be shown to have been caused in order to sustain an action for diversion of water, applies equally to the right to a flow of water acquired by a grant or user as to the natural right; see *Northam v. Hurley* (1853), 1 El. & Bl. 665, and

*Martin, B.*, in his judgment in *Rastron v. Taylor* (1855), 11 Exch. 369; and cf. *Harrop v. Hirst* (1868), L. R. 4 Exch. 43. And it also applies to the diversion of water from an artificial watercourse, when there is a right to the flow of such water: *Rochdale Canal Co. v. King* (1849), 14 Q. B. 122; 80 R. R. 222.

(*z*) *Comyns' Dig.* Action on the Case for a Nuisance, A.

(*a*) (1685), 1 Ventris, 237. See also *Luttrell's Case* (1738), 4 Rep. 86.

(*b*) Cited in *Bealey v. Shaw* (1805), 6 East, 213; 8 R. R. 466; and recognized by the Court of King's Bench in *Mason v. Hill* (1833), 5 B. & Adol. 25; 2 Nev. & M. 747; 39 R. R. 354.

(*c*) (1805), 6 East, 208; 8 R. R. 466.

*Bealey v.  
Shaw.*

divert a certain quantity of water, the first diversion having taken place in 1724. The plaintiff erected a mill lower down in 1787, to supply which he used the portion of water which remained undisturbed by the weir. After he had continued to do so for four years, the defendants enlarged their weir, in 1791, in such a manner as to divert an additional quantity of water, to the injury of the plaintiff's mill, and for this diversion the action was brought. At the trial of the cause *Graham, B.*, considered "that the important period for the jury to attend to, as to the question of right, was in 1791, when it was clear that an increased quantity of water had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluice, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claim; that persons possessing lands on the banks of rivers had a right to the flow of water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use; that every such exclusive right was to be measured by the extent of its enjoyment, and if the defendants had in 1791 taken more water from the river than had ever been done by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left for himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises, of the sluice so deepened and enlarged, was a continuance of the injury, for which the action lay." A verdict having been found for the plaintiff on this ruling, a new trial was moved for, on the ground that "the evidence of exclusive enjoyment by the defendants, and those from whom they claimed, to as much of the water as they had occasion for, increased from time to time, as more was wanted, from 1724 downwards, was evidence to be left to the jury, of their exclusive right to the whole of the river water; and that any other person erecting a mill afterwards on the same stream, must take it subject to the defendants' prior right to use the whole, and could not acquire an adverse title against it under twenty years' quiet enjoyment." The before-mentioned cases of *Cox v. Matthews* and *Prescott v. Phillips* were referred to in argument. Lord Ellenborough, in delivering his judgment, said: "I see no ground for disturbing the verdict. If the whole evidence were left to the jury, as stated by the learned judge, there can be no question upon it, and if the verdict had been for the defen-

*Benley v.  
Shaw.*

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dants, it could not have been sustained. The general law as applied to this subject is, that, *independent of any partial enjoyment used to be had by another, every man had the right to have the advantage of a flow of water in his own land, without diminution or alteration.* But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of various trades, yet, if the occupation of the party so taking have existed for so long a time that will raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. Here it appears, from 1724 downwards, there has been a partial enjoyment of the water of the river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things the plaintiff, in 1787, comes to a spot lower down the stream, and erects a weir, mill, and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert; and this he does for four years, without objection from any person. Suppose the question had arisen then, on that enjoyment by the plaintiff, of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection could have been made to it? How could it have been shown that the occupiers of the defendants' premises were then in possession of *all* the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it till 1791, when they enlarged their works; and for the very purpose of appropriating to themselves more of the water, they enlarged their sluice." Grose, J., added: "The verdict is neither against law nor fact. The plaintiff had a right to all the water flowing over his own estate, subject only to the easement which the defendants might have in it, in respect to the premises which they occupied higher up the river. To what extent did that go? It appears, prior to the year 1791, the occupiers of the defendants' premises exercised the right of having a weir in the river of a certain height, and diverting the water from the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, had a right to all the water coming over that weir which had not been carried off by such sluice. Then, in 1791, the persons under whom the defendants claim converted the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made both

wider and deeper than before, and thereby prevented the plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it. By so doing they encroached on his right, and deprived him of a benefit which was attached to his estate. It was an extension of a right before exercised by them, and a material injury to the plaintiff." Lawrence, J., commenced his judgment by saying, "I think the law was very correctly stated by the learned judge at the trial." Le Blanc, J., after recognizing the ruling of the learned judge who presided at the trial, continued: "The true rule is, that after the erection of works and the appropriation by the owner of land of a certain quantity of the water flowing over it, if the proprietor of other land afterwards takes what remains, the first-mentioned owner—however he might, before such second appropriation, have taken to himself so much more—cannot do so afterwards."

*Bealey v.  
Shaw.*

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In the case of *Saunders v. Newman* (d), it appeared in evidence that the plaintiff's mill was built upon the site of an ancient mill which had existed on that spot for the space of at least forty years before. In 1801 this old mill was burnt down, and the plaintiff then built the present mill, with a wheel of the same dimensions and on the same level with the former one. Since that period, however, he had erected a new wheel of different dimensions, requiring less water. The level of the water, however, continued the same. It was for an injury to this last wheel that an action was brought. The declaration stated the plaintiff's possession of a water-mill, and that the defendant was possessed of another mill and mill-pond; and that the water of a certain stream from time immemorial had flowed, and still of right ought to flow, in its usual channel under the mill of the plaintiff, and from thence into the mill and mill-pond of the defendant, and from the mill and mill-pond of the defendant in its usual channel, without being penned or forced back, so as to occasion any injury to the plaintiff's mill: yet the defendant wrongfully kept and continued a hatch-dam or mill-head belonging to his mill-pond raised to a much greater height than the same had theretofore been, while large quantities of the water of the stream, which ought to have flowed and escaped out of the defendant's mill-pond in its usual channel, below the same mill and away from the plaintiff's mill,

*Saunders v.  
Newman.*

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(d) (1817), 1 B. & A. 258; 19 R. R. 312.



*Saunders v.  
Newman.*

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were greatly prevented from so flowing and escaping, and by reason of such obstruction quantities of the water and stream were penned and forced back against the wheel of the plaintiff's mill, whereby he was prevented from working it. Upon these facts, Burrough, J., was of opinion, "That, as this was an action founded on the plaintiff's possession, and for an injury to that possession, and as he had not enjoyed his mill in the state in which it was when the injury was sustained for the space of twenty years, he was not entitled to recover; that if the mill had remained in the state in which it was when rebuilt in 1801, he would have been enabled to maintain his action for an injury; but he thought fit to alter it, and to make a new wheel so materially different from the former, that the evidence of his right was gone; and this being his own voluntary act, the learned judge thought that he could not maintain an action on the ground of possession, for he could only support it by a medium of proof, not that this was the same wheel, but that if the old wheel had remained the acts of the defendant would have injured him in that state." The plaintiff having been non-suited, it was contended, on showing cause against a rule for a new trial, that the plaintiff must show a prescriptive right to the mill, and 1 Rolle, Abr. 107, pl. 16, was cited, where it was said, "If I have a mill by prescription, and another erect a new mill, and force back the water on my mill so as to do me an injury, I may have my action on the case." Lord Ellenborough said, in giving judgment, "The plaintiff in this case declared that he was possessed of a mill, and that the water had been used to flow in a particular manner. Now, if by any alteration lower down the stream the water be prevented from escaping as it has usually done, and that be to the prejudice of the owner of the mill, it seems to me to form the ground of an action against the party so obstructing the water. If, indeed, the plaintiff had stated in the declaration his right to be in respect of a mill of a given construction, the result might have been different; but in the present case there must be a new trial." Bayley, J., added, "I do not see how the alteration of the wheel can make any difference in this case, at least so far as to withdraw it from the consideration of the jury; it seems to me that all the allegations in the declaration were proved. The plaintiff proved that he was possessed of a mill, and that the water flowed from time immemorial in a particular channel, and that the defendant had obstructed it. The objection, therefore,

*Saunders v.  
Newman.*

if any, must be upon the record. If a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action." Abbott, J., said, "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvement in machinery. If, indeed, the alterations made from time to time prejudiced the right of the lower mill, the case would be different; but here the alteration is by no means injurious. The old wheel drew more water than the new one." Holroyd, J., after citing the judgment of Le Blanc, J., in *Bealey v. Shaw*, continued: "The defendant, therefore, had no right to use the water in this case after the erection of the plaintiff's mill in a different manner than it had been accustomed to be used before; for, at all events, by that act the plaintiff appropriated to himself the water flowing in that particular way. Now the water used to flow without the obstruction complained of. The defendant, therefore, can have no right to turn the water back upon the plaintiff's mill. The change of the wheel can make no difference, because, at the time it was done, it was certainly lawful for the plaintiff to make the alteration. Then, if that be so, the defendant by his subsequent act cannot deprive the plaintiff of an advantage which he has already lawfully acquired."

*Williams v.  
Morland.*

The case of *Williams v. Morland* (e) has been supposed to be somewhat at variance with the doctrine laid down in the cases already cited: but when viewed with the light thrown upon it by more recent decisions (f), it appears to present nothing inconsistent with the principle already laid down; though it may be conceded, that some of the expressions made use of by the learned judges in that case are rather ambiguous. The declaration in that case stated, "That the plaintiff, by reason of a dwelling-house and land, &c., enjoyed the benefit and advantage of the water of a stream, called the Lee river, which ought to flow past

(e) (1824), 2 B. & Cr. 910; 4 Dowl. & R. 583; 26 R. R. 579.

(f) See *Mason v. Hill* (1833), 5 B. & Ad. 1; 2 Nev. & M. 747; 39 R. R. 354.

*Williams v.  
Morland.*

the premises of the plaintiff, for supplying them with water; that the defendant erected a flood-gate, and thereby prevented the water from running and flowing in its regular course, and caused the water of the stream to run in a different direction, and with increased violence and impetuosity against the banks of the plaintiff, and undermined, washed away, damaged and destroyed them." There was a second more general count, which also charged the injury to be to the banks of the plaintiff. At the trial, before Graham, B., the jury found that no damage had been done to the plaintiff's banks, but that their bad condition was caused by the plaintiff's neglect to repair them; but the jury added, that they thought the defendant should not stop the water in summer time. It was then insisted, that the plaintiff was entitled, upon this finding, to a verdict, because the defendant had stopped the water from coming to the plaintiff's premises in the summer time. But the learned judge was of opinion, that, inasmuch as the plaintiff, in his declaration, did not complain that he was deprived of a supply of water, but that the natural course of the stream was altered, and that the water was caused to flow with greater impetuosity against his lands, whereby the banks were injured, and as the jury had found that the banks were not injured by such flowing of the water, the defendant was entitled to a verdict. Liberty, however, was given to the plaintiff to move to enter a verdict for him; but the rule nisi was discharged without hearing the defendant's counsel.

The true ground of the decision of the Court of King's Bench in this case appears to be that taken by the learned judge at nisi prius, viz., that the action was brought without reference to any easement at all, for an alleged wrongful act of the defendant in throwing back water on the plaintiff's land, and injuring his banks; a ground of action that totally failed in proof (*g*). The observations of the learned judges, as to the general law of flowing water, were totally uncalled for by the question then before the court. "Flowing water," said Bayley, J., "is originally publici juris; so soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriated it; subject to that right all the rest of the water remains publici juris."

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(*g*) See per Curiam in *Mason v. Hill* (1833), 5 B. & Ad. 20; 2 Nev. & M. 747; 39 R. R. 354.

In *Liggins v. Inge* (h), already cited, the precise question now treated of did not arise: the original right of the plaintiff to the flowing water was not denied, and the case turned entirely on the effect of a parol licence. In the judgments in *Williams v. Morland*, as well as in *Liggins v. Inge*, there are dicta to the effect, "that, by the law of England, the possessor who first appropriates any part of water flowing through his land to his own use, has a right to the use of so much as he then appropriates against any other:" but more recent decisions, in which all the authorities have been elaborately reviewed and considered, have established that this position is correct only if taken with the qualification, "that, by such appropriation, no greater right is claimed than to a flow of water in its usual and accustomed course:" it being clearly settled that no appropriation, except for such a period as will confer an easement, can diminish the natural rights of other parties possessing lands along the course of the stream."

"The right to the use of water," said Sir J. Leach, in *Wright v. Howard* (i), "rests upon clear and settled principles; *primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years." The learned judge then added, "that an action will lie at any time within twenty years where injury happens to arise in consequence of the new purpose of the party to avail himself of his common right" (k).

(h) (1831), 7 Bing. 682; 5 Moo. & P. 712; 33 R. R. 615.

(i) (1823), 1 Sim. & Stuart, 190; 24 R. R. 169.

(k) *Re v. Trafford* (1831), 1 B. & Ad. G.

874; 34 R. R. 680; S. C. in error, 6 Bing. 204; 1 Moo. & Scott, 401; 2 Cr. & J. 265; which appears to have been compromised; *Menzies v. The Marquis of Breadalbane* (1828), 3 Bligh, N. S. 414; 32 R. R. 103.

*Mason v. Hill.* The case of *Mason v. Hill* (*l*), which may be considered as having settled the law on this point (*m*), came twice before the Court of King's Bench, and on both occasions elaborate judgments were pronounced, both fully sanctioning the principle, "that if the owner of land adjoining a stream has once appropriated the water to a beneficial purpose, he may maintain an action against any person diverting it from its usual course, though such diversion be the continuation of an act done previous to that beneficial appropriation on his part, provided such diversion has not continued for a sufficient length of time to confer an easement."

The declaration stated, "that the plaintiff was lawfully possessed of a small manufactory and premises, and by reason thereof ought to have had and enjoyed the benefit and advantage of the water of a certain stream, which had been used to run and flow, and of right ought still to run and flow, to his mill, &c., in great purity and plenty, to supply the same with water for working, using, and enjoying the same, and for other necessary purposes; that the defendants, by a certain dam and obstructions across the stream above the plaintiff's premises, impounded, penned back, and stopped the water, and by pipes, stiles, &c., diverted it from the plaintiff's premises, and prevented it from flowing along the usual and proper course; and further, that the defendants injuriously heated, corrupted, and spoiled the water, so that it became of no use to the plaintiff, whereby he was prevented from using his mill and premises in so extensive and beneficial a manner as he otherwise would have done." At the trial before Bosanquet, J., the following appeared to be the facts of the case. The plaintiff and the defendants had land contiguous to the stream; the land of the defendants being situate on a part of the stream above the land of the plaintiff. The stream acted as a sewer to part of the town of Newcastle-under-Lyme, and the water was consequently foul and muddy: it had been unprofitable to both parties until it was diverted by the defendants; this diversion took place in 1818, by the defendants erecting a weir or dam across the stream at the part contiguous to their own land. By means of this weir, and of channels and reservoirs made in their land, great part of the water was conveyed to certain buildings belonging to them at some distance from the weir, and there used as part of the supply of water

(*l*) (1832), 3 B. & Ad. 304; 5 B. & Ad. 1; 2 M. & Nev. 747; 39 R. R. 354.

(*m*) [See judgment in *Embrey v. Owen* (1851), 6 Ex. 369, acc.; 86 R. R. 331.]

necessary for a steam engine. About ten years after this diversion, the plaintiff made a channel in his land contiguous to the stream, for conveying the water to some buildings belonging to him at a little distance from the stream, for the purpose of some process of manufacture not previously carried on there. Some attempts at accommodation between the parties took place, but were ineffectual or unsatisfactory, and therefore the action was brought; the plaintiff's works were occasionally suspended for want of the water diverted by the defendants, and which, after it had been used by them, was suffered to pass away into a level below the plaintiff's works. Mason v. Hill.

It was contended on the part of the defendants, that as they had first appropriated the use of the water in the sewer to beneficial purposes without injuring the plaintiff, they had acquired a right thereto, and were not answerable for the diversion; and *Williams v. Morland* was cited. The learned judge, acting upon that authority, directed the jury to find a verdict for the defendants.

In the ensuing term a rule was obtained for a new trial, on the ground that the defendants, who had diverted the water, could acquire no right to have it flow in its new channel by mere appropriation without twenty years' unmolested enjoyment. Cause having been shown against the rule, the Court took time to consider their judgment, which was afterwards declared by Lord Tenterden. After stating the facts of the case, his Lordship proceeded, "In this state of things the present action was brought; and for the defendants it was insisted that they, having first appropriated the water beneficially to their use at a time when the appropriation was not injurious to the plaintiff, had a right to the water and to the use of it, notwithstanding the diversion had, by subsequent acts of the plaintiff, become injurious to him. The plaintiff, on the other hand, insisted that the defendants did not, nor could by law, acquire a right to the water by a diversion and enjoyment for a period short of twenty years. The several decisions and dicta of learned judges on this subject were quoted at the bar, and need not be repeated. It appears to have been held that a person could not complain of a diversion or obstruction of water from which, at the time of his complaint, he suffered nothing; which seems to have been on the ground, that in such a case it was *injuria sine damno*. It is not now necessary to say whether such a principle should be admitted. The only decision upon a question

Mason v. Hill. like that in the present case, is the judgment of the present Master of the Rolls, then Vice-Chancellor, in the case of *Wright v. Howard* (n). This judgment is expressed in language so perspicuous and comprehensive that I shall here quote it."

His Lordship then cited the judgment of the Master of the Rolls as above given (o), and concluded by saying, "We all agree in the judgment thus delivered; and upon the authority of that decision and the reasoning of the learned judge, we are of opinion that the defendants did not acquire a right by their appropriation against the use which the plaintiff afterwards sought to make of the water; and consequently the rule for a new trial must be made absolute."

On the second trial the jury found a special verdict, the substance of which is set out in the judgment of the Court, which was delivered by Lord Denman, C. J., after time had been taken by the Court to consider. After stating the pleadings, his Lordship proceeded as follows:—

"The substance of the special verdict is this: The defendants' mill was erected in 1818; the plaintiff's in 1823, on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land.

"At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parol licence to the defendants to make a dam at a particular place above, where the *Sitchwell Tree* stood, and to take what water they pleased from that point to their mill, which water was so taken and returned by pipes into the stream above the spot where the plaintiff's mill was afterwards erected.

"In 1818 the defendants conducted part of the water of the *Over Canal Springs*, which had before flowed into the stream, into a reservoir for the use of their mill.

"After the plaintiff erected his mill, namely, in 1828, he appropriated to its use all the surplus water, viz., that which flowed over and through the dam; that from the *Over Canal Springs*, which was not conducted into the reservoir; and all from the *Sitchwell Spring* (which was another feeder of the brook); and also that which was returned by the defendants into the stream.

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(n) (1823), 1 Sim. & Stu. 190; 24 R. R. 169.

(o) Ante, p. 257.

"In January, 1829, the plaintiff demolished the dam at the *Sitchwell Spring*. The defendants erected a new dam lower down, and by means of it diverted from the plaintiff's mill, at some times, *all* the stream, including all the water so appropriated; at others a part of it, and returned the remainder in a heated state into the stream. Mason v. Hill.

"And the questions upon this special verdict are,—

"Whether the plaintiff is entitled to recover for the diversion of the whole water of the stream, or of any and what part of it, or for the heating of the part returned ?

"That the plaintiff has a right to a verdict for the injury sustained by the abstraction of *the whole of the surplus water*, and by the abstraction of part and the heating of the remainder of that surplus water, does not admit of the least doubt. In any view of the law on this subject,—whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side,—the plaintiff was entitled to this surplus, for he filled both characters; he was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey v. Shaw* (*p*).

"The learned counsel for the defendants argued, that inasmuch as the plaintiff pulled down the dam at the *Sitchwell Tree*, in consequence of which the new dam was erected, he must be considered as the author of the mischief, and has no right to complain of it. It is, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it, or brought an action; they had no right to construct another at a different place, and by means of it abstract more water than the other did.

"The remaining questions are, whether the plaintiff can recover, in respect of the abstracting, or the injury by heating, of that portion of water which was before diverted by the licence of the then owner and occupier of the plaintiff's field, and, secondly, in respect of that portion of the *Over Canal Springs*, which was conveyed in 1818 to the defendants' reservoir;—both of which portions have been at one time entirely, and at another partially

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(*p*) (1805), 6 East, 208; 8 R. R. 466.



Mason v. Hill. abstracted, and in the latter case returned in a heated state into the brook; and we are of opinion that the plaintiff is entitled to recover in respect of both.

“As to the first of these portions, the defendants contend that the plaintiff has no right of action, because the former owner and occupier of his land gave an irrevocable licence by parol to the defendants to divert so much water by the *Sitchucell Tree Dam*; and to prove that a parol licence to divert water, which had been acted upon by the person to whom it was given, and expense incurred in consequence, is irrevocable, the case of *Liggins v. Inge* (q) was cited. But, admitting that the licence to abstract the water at that particular point, and by means of that dam, was irrevocable, and therefore that the plaintiff was a wrongdoer in pulling the dam down, it by no means follows that the plaintiff is not to recover for an equal portion of water abstracted at a different place. In the first place, the licence is not general to take away at any point, but at *this* only; and in the second place, if the licence had been general, to take away at any place, it would have been clearly revocable, except as to such places where it had been acted upon, and expense incurred (for it is on that ground only that such a licence can be irrevocable); and as it was revoked before the last dam was erected, the defendants could not justify the abstraction of any portion of the water by virtue of the licence at such dam.

“The last question is, whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the *Ower Canal Springs*, and collected in a tank in 1818. This was taken without licence, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course; and we are of opinion that they did not.

“This point might, perhaps, be disposed of in favour of the plaintiff, even admitting the law to be as contended for by the defendants, that the first occupant acquires a right to flowing water; for, by this special verdict, all the water of the brook is

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(q) (1831), 7 Bing. 682; 5 Moo. & P. 712; 33 R. R. 615.

found to have been appropriated by Ashley the father, and used Mason v. Hill. for twenty years up to the year 1818, for watering his cattle and irrigating the field now the plaintiff's. A right to use the water, thus acquired by occupancy, in right of the field, must have passed to the plaintiff, and could not be lost by mere non-user from 1819 to 1829; and the total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle on which rights of this nature depend.

"The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantages of that stream flowing in its natural course, and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below—that neither can any proprietor above diminish the quantity, or injure the quality of water, which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant:—and that, whether the loss, by diversion, of the general benefit of such a stream be or be not such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

"The proposition of the defendants is, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, *including* the proprietor of the land below, who has no right of action against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and, in default of his having done so, may altogether deprive him of the benefit of the water.

"In deciding this question, we might content ourselves by referring to, and relying on, the judgment of this Court in this case, on the motion for a new trial (*r*); but as the point is of

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(*r*) (1832), 3 B. & Ad. 304; 39 R. R. 354.

Mason v. Hill. importance, and the form in which it is now again presented to us leads to a belief that it will be carried to a court of error, we think it right to give the reasons for our judgment more at large.

"The position, that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrongdoer; and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *The Earl of Rutland v. Bowler* (s). But it is a very different question, whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away; and, by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another.

"We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealey v. Shaw* (t), *Saunders v. Newman* (u), *Williams v. Morland* (x). It appears to us also, that the doctrine of Blackstone and the dicta of learned judges, both in some of those cases and in that of *Cox v. Matthews* (y), have been misconceived.

"In the case of *Bealey v. Shaw*, the point decided was, that the owner of land through which a natural stream ran (which was diminished in quantity by having been in part appropriated to the use of works above, for twenty years and more, without objection,) might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to

(s) (1823), Palmer, 290.

(t) (1805), 6 East, 208; 8 R. R. 466.

(u) (1818), 1 B. & A. 258; 19 R. R.

312.

(x) (1824), 2 B. & C. 910; 26 R. R. 579.

(y) (1684), 1 Vent. 237.

that mill, by a further subsequent diversion of the water. This *Mason v. Hill*.  
 decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land *through which* the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above, for a subsequent act, by which that benefit is diminished, and it does not in any degree support the position, that the first occupant of a stream of water has a right to it *against* the proprietor of land below. Lord Ellenborough distinctly lays down the rule of law to be, that, 'independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water *in his own land*, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right.' Mr. Justice Lawrence confirms the opinion of Mr. Baron Graham on the trial, that 'persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use.' Mr. Justice Le Blanc in his judgment says as follows:—'The true rule is, that, after the erection of works, and the appropriation, by the owner of land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains, the first-mentioned owner, *however he might, before such second appropriation, have taken to himself so much more*, cannot do so afterwards;' and this expression, in which, in truth, that learned judge cannot be considered as giving any opinion upon the effect of a prior appropriation, is the only part of the case which has any tendency to support the doctrine contended for by the defendants.

"The case of *Saunders v. Newman* (s) is no authority upon this question, and is cited only to show, that Mr. Justice Holroyd quotes the opinion of Le Blanc, J., above mentioned; and he confirms it, so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had

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(s) (1818), 1 B. & A. 258; 19 R. R. 312.

Mason v. Hill. a right of action for any subsequent alteration, to the prejudice of his mill; about which there is no question.

"The last and principal authority cited is that of *Williams v. Morland* (a).

"The case itself decides no more than this: that the plaintiff, having in his declaration complained that the defendants had, by a flood-gate across the stream above, prevented the water from running in its regular course through the plaintiff's land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff's banks, could not recover, the jury having found that no *such* damage was sustained. The judgments of all the judges proceed upon this ground; though there are some observations made by my brother Bayley, which would seem at first sight to favour the proposition contended for by the defendants.

"These observations are, that 'flowing water is originally publici juris. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains publici juris. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such right ought to show that he is prevented from having water which he has *acquired* a right to use for some beneficial purpose' (b).

"The dictum of Lord Chief Justice Tindal in *Liggins v. Inge* (c) is to this effect:—'Water flowing in a stream, it is well settled by the law of *England*, is publici juris. By the *Roman* law, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined things, the property of which belongs to no person, but the use to all. And by the law of *England*, the person who first appropriates any part of this water *flowing through his land* to his own use, has the right to the use of so much as he then appropriates, against *any other*;' and for that he cites *Bealey v. Shaw and others* (d), which case, however, is no authority for this position, as far as relates to the owner of the land below; and probably, therefore, the Lord Chief Justice intended the expression 'any other' to apply

(a) (1824), 2 B. & C. 910; 26 R. R. 579.

(b) (1824), 2 B. & C. 913.

(c) (1831), 7 Bing. 692; 33 R. R. 615.

(d) (1805), 6 East, 208; 8 R. R. 466.

only to those who diverted or obstructed the stream. To these dicta may be added the passage from Blackstone's Commentaries, vol. ii. p. 14 :—' There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had ; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences ; such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance ; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.'

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"And, 2 Blackstone's Commentaries, p. 18, 'Water is a moveable wandering thing, and must of necessity continue common by the law of nature ; so that I can only have a temporary, transient, usufructuary property therein ; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it.'

"None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

"The Roman law is (2 Inst. tit. 1, s. 1) as follows : 'Et quidem naturali jure, communia sunt omnium hæc : aer, aqua profluens, et mare, et per hoc littora maris.' It is worthy of remark that Fleta, enumerating the *res communes*, omits 'aqua profluens,' Lib. iii. ch. 1. Vinnius, in his commentary on the Institutes, explains the meaning of the text,—'Communia sunt, quæ, a naturâ ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt : Huc pertinent præcipue aer et mare,

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quæ, cum propter immensitatem, tum propter usum quem in commune omnibus debent, jure gentium divisa non sunt, sed relicta in suo jure et esse primævo, ideoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbris collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremò propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem naturâ comparatæ sunt: tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus eâ occupatione usus ille promiscuus non læditur.' And he proceeds to describe the use of water, 'aqua profluens ad lavandum et potandum unicuique jure naturali concessa.'

"The law as to rivers is, 'flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque.' And Vinnius, in his commentary on this last passage, says, 'unicuique licet in flumine publico navigare et piscari.' And he proceeds to distinguish between a river and its water: the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable, whilst it is there, of becoming the subject of property, like the air and sea.

"In the Digest, book 43, tit. 13, in public rivers, whether navigable or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers; and in section 4 it is said that private rivers in no way differ from any other private place.

"From these authorities, it seems that the Roman law considered running water, not as a bonum vacans in which anyone might acquire a property; but as public or common, *in this sense only*, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only.

"We think that no other interpretation ought to be put upon the passage in Blackstone; and that the dicta of the learned judges above referred to, in which water is said to be publici juris, are not to be understood in any other than this sense; and it

appears to us that there is no authority in our law, nor, as far we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein. Mason v. Hill.

"It remains to observe upon one case which was cited for the defendants (*Cox v. Matthews (e)*), in which Lord Hale said, 'if a man hath a watercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say antiquum molendinum; and upon the evidence it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he *used to turn* the stream as he saw cause; for *otherwise* he cannot justify it, though the mill be newly erected.' What is said by Lord Hale is perfectly consistent with the proposition insisted upon by the plaintiff; and the defendants in the supposed case would have no right to divert unless they had gained it by prescription (which is the meaning of Lord Hale), or, according to the modern doctrine, until the presumption of a grant had arisen.

"And this view of the case accords with the law, as laid down by Serjeant Adair, Chief Justice of Chester, in *Prescott v. Phillips (f)*, and by Lord Ellenborough in *Bealey v. Shaw (g)*, and by the Master of the Rolls in his luminous judgment in *Howard v. Wright (h)*.

"We are, therefore, clearly of opinion, that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the Over Canal Springs, as well as the other injuries complained of; and for which damages have been assessed by the jury.

"As to the right to recover for the injury sustained by the water being returned in a heated state, there can be no question (i). Actionable to heat water of natural stream.

"Whether he could have maintained an action *before* he had constructed his mill, or applied the water of the stream to some profitable purpose, we need not decide. It may be proper, however, to refer to two cases not cited in the argument. In *Palmer v. Keblethwaite (k)*, the declaration merely stated that the water

(e) (1684), 1 Ventr. 237.

(f) Cited, 6 East, 213; 8 R. R. 470.

(g) (1805), 6 East, 208; 8 R. R. 466.

(h) (1823), 1 Sim. & Stu. 190; 24

R. R. 169.

(i) [Cf. *Young v. Bankier Distillery Co.*, [1893] A. C. 691.]

(k) (1896), 1 Show. 64.



Mason v. Hill. used and ought to run to the plaintiff's mill; and Lord Holt said, 'Suppose a watercourse run to my ground, and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? Must you not lay some use for it? But you will speak to it again.' In the report of the same case in Skinner, 65, Pollexfen, in argument, said he *took* it to be a clear case that, the stream being the plaintiff's, the defendant could not divert it, and so held the Court, that an action had lain for diverting the stream, though no mill had been erected. The final result of that case does not appear in the books, and the roll has been searched for in vain.

"In *Glynne v. Nichols* (1) a similar question was raised, which appears from the report of the same case in Comberbach, p. 43, to have been decided *for the plaintiff*.

"It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown.

"But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court."

Whether  
damage  
necessary to  
maintain suit.

It has already been observed, that no additional evidence of the right of a party to a flow of water could be derived from the mere fact of his having recently appropriated it to a beneficial purpose; but it appears to have been formerly held, that a person could not complain of a diversion or obstruction of water, from which, at the time of his complaint, he suffered nothing, which seems to have been on the ground that in such a case it is *injuria sine damno* (m).

"In order to entitle himself to recover," said Holroyd, J., in *Williams v. Morland* (n), "the plaintiff should show the loss of some benefit, or the deterioration of the value of the premises." And Littledale, J., in the same case, laid it down as law, that "water is of that peculiar nature, that it is not sufficient to allege in a declaration that the defendant prevented the water from flowing to the plaintiff's premises, the plaintiff must state an actual damage accruing from the want of the water—the mere right to use the water does not give a party such a property

(1) (1687), 2 Show. 507.

(m) Per Curiam, *Mason v. Hill* (1832),  
3 B. & Adol. 312; 39 R. R. 354.

(n) (1824), 2 B. & Cr. 915; 26 R. R.  
579.

in the new water, constantly coming, as to make a diversion or obstruction of the water per se give him any right of action."

Whether  
damage  
necessary to  
maintain suit.

Lord Tenterden, in delivering the judgment of the Court in *Mason v. Hill*, above alluded to, says, "It is not necessary to say whether such a principle should be admitted;" and it has been seen that the Court of King's Bench, in their elaborate judgment on that case, the second time it came before them, appear to have guarded themselves from being supposed to favour such a doctrine, or rather to have purposely expressed their doubts of its correctness. "It must not, therefore, be considered as clear," says Lord Denman, in concluding the judgment, after citing the cases of *Palmer v. Keblethwaite* (o) and *Glynne v. Nichols* (p), "that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown."

Even if the necessity of some act of appropriation were admitted, the attempt to apply a stream of water to some beneficial purpose must be sufficient to give a right of action, although such attempt be rendered abortive by the previous diversion or obstruction of the water—as, for instance, if the owner of the land were to erect a mill on the banks of the dried-up stream, or drive his cattle there to water, at any time before the disturbing party had acquired an easement; but, as it is conceded that "deterioration of the value of the premises" (q) is sufficient to confer a right of action, it is scarcely possible to imagine a case, in which the diversion of a running stream of water would not be attended with the result of diminishing the value of the land through which it flows (r).

No proof  
of damage  
necessary.

Independently, however, of this view of the case, and assuming that no actual damage is shown to arise from the diversion, an action may be maintained for it, on the ground that the undisturbed continuation of such acts, without the express consent of the owner of the land, would be evidence of a right to do them (s).

What inter-  
ference with  
water action-  
able.

(o) (1696), 1 Shower, 64.

(p) (1687), 2 Shower, 507.

(q) Per Holroyd, J., in *Williams v. Morland* (1824), 2 E. & Cr. 916; 26 R. R. 579.

(r) See *Fay v. Prentice* (1845), 1 C. B. 828; 68 R. R. 823 [and *Beaston v. Weate* (1856), 5 E. & B. 986.]

(s) *Young v. Spencer* (1829), 10 B. & C. 145; *Baxter v. Taylor* (1832), 4 B. & Ad.

72; 38 R. R. 227; *Hopwood v. Scholfield* (1837), 2 Mood. & Rob. 34. [See judgment of Coleridge, J., *Roehdale Canal Co. v. King* (1849), 14 Q. B. 135; 80 R. R. 222; *Wood v. Waud* (1849), 3 Exch. 772; *Swindon Waterworks Case*, quoted above, p. 245; *Pennington v. Brinsop Hall Coal Co.* (1877), L. R. 5 Ch. D. 769; *Roberts v. Gwyrfai District Council*, [1899] 1 Ch. 583; [1899] 2 Ch. 608;

What interference with water actionable.

[And it may now be considered as settled according to the judgments already referred to, which confirm the views of the author expressed in the second edition, that no act of appropriation is necessary, and that no actual damage need be shown if the right to the flow of the stream in its natural state be infringed by a use of it beyond that to which every riparian owner is entitled (f).

*McCartney v. Londonderry and Lough Swilly Railway*, [1904] A. C. 301 (see particularly per Lord Lindley, at p. 313); *Sharp v. Wilson* (1905), 93 L. T. 155.

*Kensit v. Great Eastern Railway* (1884), L. R. 27 Ch. Div. 122, was decided on the ground that what was there complained of was not in excess of the defendant's rights, and never could grow into a prescriptive right. (Per Lord Lindley in *McCartney v. Londonderry and Lough Swilly Railway* (*ubi sup.*), at p. 313.)

Some interference must be shown. *Cooper v. Crabtree* (1882), L. R. 20 Ch. Div. 539.

(f) *Embrey v. Owen* (1851), 6 Exch. 353; 86 R. R. 331; *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590. See also the judgments in *Wood v. Waud* (1849), 3 Exch. 772, 773; 77 R. R. 809; and Coleridge, J., in *Rochdale Canal Co. v. King* (1849), 14 Q. B. 135; 80 R. R. 222.

The question what is a lawful use of the water by each riparian owner in the exercise of his natural right, depends upon the circumstances of each case; as the extent to which the enjoyment of, or power to enjoy, the flow of the stream by other riparian owners may be affected by the acts of one, depends upon the size of the stream, the velocity of the current, the nature of the soil, and a variety of other facts. It is entirely a question of degree, and it is impossible to define precisely the limits which separate the permitted use of the stream from its wrongful application. (See the judgments in *Embrey v. Owen*, 6 Exch. 371—373; 86 R. R. 331, in which case the question was, whether the defendant had infringed the plaintiff's right by using the water for irrigation: *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 611, 612, in which the question was as to the right to impede the flow by occasionally shutting sluices; and the case put by Coleridge, J., in *Chasemore v. Richards* (1857), 2 H. & N. 190, of a man exhausting the running water by irrigation, which would be clearly illegal, though the abstraction of the same amount of

water from a large river might have been perfectly legal.) The question in each case should seem to be, is the user such as to affect the natural flow of the water of the stream to an extent greater than that which is necessarily incident to the common enjoyment of the stream by all the riparian owners? If it be, then it may be made the subject of an action by any owner whose actual use of or power to use the water is affected by it. The question can only arise in practice with reference to some extraordinary use of the water; the distinction between which and its ordinary uses is pointed out above; and see the preceding note.

In connection with the question what interference with water is actionable it may be mentioned that it is actionable to obstruct the free passage of salmon up a river. (*Pirie v. Kintore* (Earl of), [1906] A. C. 478.) Rights with regard to the free passage and obstruction of salmon, which are regulated by statutory provision, have on several occasions come before the Courts. (See *Weld v. Hornby* (1806), 7 East, 195; *Rolle v. Whyte* (1868), L. R. 3 Q. B. 286; *Leconsfield v. Lonsdale* (1870), L. R. 6 C. P. 657.)

In *Barker v. Faulkner* (1898), 79 L. T. 24, the question of the right to obstruct the passage of fish other than salmon arose, but was not determined. In that case the plaintiff and defendant were adjoining riparian owners upon a well-known trout stream. The defendant erected upon his own property an embankment or weir, with fenders and wire gratings, avowedly for the purpose of preventing fish from passing up the river to the plaintiff's close, whilst allowing them to swim down the river to the defendant's close, and in respect of this obstruction the plaintiff claimed an injunction. The action came on for argument on questions of law arising on the pleadings, and Stirling, J., after considering the cases with reference to salmon, thought that the principle involved in those authorities might extend to other fish, and declined to deal

[The natural right to the flow of water applies, however, only to water flowing in some defined natural (*u*) channel; and therefore the owner of land upon which there is surface water rising out of springy or boggy ground and flowing in no definite channel, or water rising occasionally at one spot but having no defined course, has a right to get rid of such water by draining the land or in any way he pleases, although, if not so disposed of, it might ultimately have reached the course of a natural stream (*x*).]

Channel must be defined.

The Court laid down that the right of the riparian owner to the natural flow of water cannot extend further than the right to the flow of the stream itself and to the water flowing in some defined (*y*) natural channel, either subterranean or on the surface, communicating directly with the stream itself; and in *Broadbent v. Ramsbotham* (*z*), the owner of the soil was held not to be liable to an action for draining a pond, the water of which occasionally, when it exceeded a certain depth, escaped and squandered itself over the surface, some of it augmenting a natural stream, but by no defined channel; and see also the case of *Chasemore v. Richards* (*a*), which confirms these authorities.

On the other hand it was decided in *Dudden v. Guardian of the Clutton Union* (*b*), and in *Mostyn v. Atherton* (*c*), that where the source of a stream is a natural spring rising out of the ground in a continuous flow and passing away in a natural channel, a diversion of such stream, by sinking a tank at the fountain-head and so collecting the water there and leading it away, is equally actionable

with the case on the material then before him, ordering it to proceed in the ordinary course.

(*u*) But in the case of an artificial watercourse, the origin of which is unknown, the proper inference from the user of the water and from other circumstances may be that the rights of the riparian proprietors are the same as if the stream had been a natural one. (*Baily & Co. v. Clark, Son, and Morland*, [1902] 1 Ch. 649; cf. *Mostyn v. Atherton*, [1899] 2 Ch. 360.)

(*x*) *Raucastron v. Taylor* (1855), 11 Exch. 369.

(*y*) "A watercourse consists of bed, banks, and water; yet the water need not flow continually, and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing

stream of water, which at certain seasons is dried up, and those occasional bursts of water which, in times of freshet or melting of ice and snow, descend from the hills and inundate the country. To maintain the right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to flow continually, as stated above, and it may at times be dry; but it must have a well-defined and substantial existence."—Angell on Watercourses.

(*z*) (1856), 11 Exch. 602.

(*a*) Cited post, p. 285.

(*b*) (1857), 1 H. & N. 627. Cf. *Bunting v. Hicks* (1894), 70 L. T. 455; 7 R. 293.

(*c*) [1899] 2 Ch. 360.

**Channel must be defined.** [with a diversion in any other part of the channel, the defined channel commencing at the very source (*d*).]

**Civil law. Servitudes in water.**

By the civil law a servitude of water flowing in its accustomed course might be obtained by the enjoyment of a stream of water during the requisite period; and although originally no such right could be valid, unless binding upon the owner of the land in which the spring rose, yet this rule was afterwards relaxed (*e*). Such a servitude appears to have been valid if the water increased the value of the dominant estate, or was capable of being appropriated to a purpose of utility (*f*), or even of pleasure (*g*).

**Natural right to discharge water.**

It has been already seen, with regard to running water, that every proprietor on its banks has a right to claim that the stream should run on in its accustomed course. This applies as well to the right to discharge the water as to receive it, [and any obstruction of running water of such a character that it might reasonably be expected that some injury would be caused to a higher riparian owner is actionable at the suit of such higher riparian owner (*h*).]

**Easements.**

In addition to the natural right to receive flowing water in its accustomed course—easements of an affirmative nature, the object of which is to interfere with the natural course of the stream, may be acquired by user over a stream flowing through a man's land or through his neighbour's land (*i*). Thus a right may be acquired to throw back upon the land of proprietors higher up the stream the water which, unless so reflected, would, by the force of gravity,

(*d*) Upon the question of fact, what is water flowing in a defined natural channel, see the case of *Ennor v. Barwell*, V.-C. S. (1860), 6 Jur. N. S. 1233; 2 Giff. 410; on appeal, 1 De G. F. & J. 529; 7 Jur. N. S. 788; and see the observations on that case, post, p. 291, note (*a*).

(*e*) Servitus aquæ ducendæ vel hauriendæ, nisi ex capite vel ex fonte, constitui non potest; hodie tamen ex quocunque loco constitui solet.—Dig. 8, 3, 9, de serv. præd. rust.

Si aquam per possessionem Martialis eo sciente duxisti, servitutem exemplo rerum immobilium tempore quesisti.—Cod. 3, 34, 2, de serv. et aquâ.

(*f*) Si manifestè doceri possit jus aquæ ex vetere more atque observatione per certa loca profluentis utilitatem certis fundis irrigandi causâ exhibere; procurator noster ne quid contra veterem (formam) atque solemnem morem innovetur, providebit.—Ibid. 7.

Labeo scribit, etiam si prætor hoc interdicto de aquis frigidis sentiat: tamen de calidis aquis interdicta non esse deneganda. Namque harum quoque aquarum usum esse necessarium; nonnunquam enim refrigeratæ usum irrigandis agris præstant: his accedit, quod in quibusdam locis, et quum calidæ sunt, irrigandis tamen agris necessariæ sunt—ut Hierapoli: constat enim apud Hierapolitanos in Asiâ agrum aquâ calidâ rigari. Et quamvis ea sit aqua, quæ ad rigandos non sit necessaria, tamen nemo ambigit his interdictis locum fore.—Dig. 43, 20, 1, § 13, de aquâ quot. et aest.

(*g*) Hoc jure utimur ut etiam non ad irrigandum, sed pecoris causâ vel amenitatis, aqua duci possit.—Dig. 43, 20, 3.

(*h*) *Ambler v. Bradford Corporation* (1902), 87 L. T. 217, and cases there discussed.

(*i*) [*White v. White*, [1906] A. C. 72.]

pass from it; or to discharge the water upon the land lying lower down the stream, either injured in quality, or with a degree of force greater or less than the natural current (*k*).

The right claimed by the defendant in *Saunders v. Newman*, already cited, is an instance of the former class of affirmative easements (*l*).

In *Wright v. Williams* (*m*), it was held that a right to let off upon the neighbouring land water which had been used for the precipitation of minerals, and was thereby rendered noxious, was an easement, and might be acquired, like any other easement, by user (*n*).

Though every one in building is bound so to construct his house as not to overhang his neighbour's property, and construct his roof in such a manner as not to throw the rain water upon the neighbouring land (*o*), yet there appears to be authority in

(*k*) [But in order to acquire a right to use or to affect the water in a manner not justified by natural right, so as to abridge the natural rights of the other riparian owners to the use of the stream, it must be shown that the user relied upon was such as to affect either the actual use that those other owners have made of the stream, or their power to use it (if so minded), so as to raise the presumption of a grant, and so render the tenements of those other owners servient tenements: *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 611. Cf. *Kensit v. Great Eastern Railway* (1883), L. R. 23 Ch. D. at p. 574; aff. on appeal, 27 Ch. Div. 122. The same rules apply whether the right claimed is to affect the quantity, the quality or the velocity of the water; and the period and all other requisites of the user are like those of all other affirmative easements, and have been already discussed.]

(*l*) Ante, p. 253; 1 B. & A. 258. [*Beaton v. Weate* (1856), 5 El. & Bl. 986, is an instance of a right so acquired by the owners of the dominant tenement to go from time to time upon the servient tenement, for the purpose of diverting the water of a natural stream flowing along it, so as to cause it to pass through that tenement by an artificial out to the dominant tenement, for the purpose of supplying cattle with water. In that case the right claimed was not to the continual flow of the water, and in that respect it differs from the ordinary case of the owner of a mill not upon the bank of a river, who has ac-

quired by user the right to divert the river to his mill by an artificial cut through a neighbour's land. The use of artificial aids, as mill leats, &c., by a riparian owner, does not in any way affect his natural right to the use of the water. If the rights of other proprietors are not infringed thereby, he may employ such means as he thinks proper. Cf. *Ambler v. Bradford Corporation* (1902), 87 L. T. 217.

In *Roberts v. Fellowes* (1906), 94 L. T. 279, a claim to a right similar to that claimed in *Beaton v. Weate* was sustained.] (*m*) (1836), 1 M. & W. 77; 46 R. R. 265.

(*n*) [Cf. *Carlton v. Lovering* (1857), 1 H. & N. 797; *McIntyre v. McGavin*, [1893] A. C. 268. In *Murgatroyd v. Robinson* (1857), 7 El. & Bl. 391, it was argued that a right to use a natural stream for the purpose of washing away the ashes from a steam engine and other sweepings of a mill on the bank of the stream, could not be acquired under Lord Tenterden's Act, as being unreasonable and destructive of the property of the owners lower down the stream. The Court pronounced no opinion upon the question, as the case went off on another point; but no valid distinction can be made between this and the case above cited. The owner lower down clearly might grant the right claimed in one case as well as in the other; and if so, according to the judgment in *Carlton v. Lovering*, the statute would apply.]

(*o*) Com. Dig. Action on the Case for

Easements. our law for the position, that a man may acquire a right, by user, to project his wall or eaves over the boundary line of his property, or discharge the rain running from the roof of his house upon the adjoining land.

The existence of such a right, both as to the eaves and water droppings, is recognized by the Court of Exchequer in *Thomas v. Thomas* (*p*).

There are ancient decisions, recognizing the same easement, in the case of a discharge of water on the neighbouring land by means of a gutter or leaden pipe (*q*).

“If a man hath a sue, that is to say, a spout, above his house, by which the water used to fall from his house, and another levies a house paramount the spout, so that the water cannot fall as it was wont but falls upon the walls of the house, by which the timber of the house perishes, this is a nuisance” (*r*). [In the case of *Pyer v. Carter* (*s*) there was an easement of both kinds, for the defendant to have the rain water flow from his eaves on to the plaintiff’s roof, and for the plaintiff to have such water, together with the water originally falling on his own roof, carried away together by a drain on the defendant’s land.]

These two classes of easements are distinctly recognized by the civil law under the head of Urban Servitudes, “that a man shall receive upon his house or land the flumen or stillicidium of his neighbour” (*t*).

“The difference,” says Vinnius in his Commentary on this passage, “between the flumen and the stillicidium is this—the latter is the rain falling from the roof by drops (*guttatim et stillatim*); the flumen is when it is poured forth in a continuous stream from the lower part of the building. The servitude of receiving the stillicidium exists when my neighbour is compelled to receive upon his house the rain water running from my roof; the servitude of receiving the flumen, when he is compelled to

a Nuisance, A.; [Dig. viii. 2, 2; Inst. II. iii. 1; Code Civil, art. 681.]

(*p*) (1835), 2 Cr., M. & Ros. 34; 41 R. R. 678. [As to an overhanging branch, see *Lemmon v. Webb*, [1895] A. C. 1.]

(*q*) *Lady Browne’s Case*, 3 Dyer, 319 b, cited in *Sury v. Pigott* (1625), Palmer, 446; Com. Dig. Action on the Case for Nuisance, A.; *Baten’s Case* (1738), 9

Rep. 53 b, recognized in *Fay v. Prentice* (1845), 1 C. B. 828; 68 R. R. 823.

(*r*) Rolle, Abridg. Nuisans, G. 5, citing 18 Edw. 3, 22 b; Vin. Abr. Nuisance, G. 5.

(*s*) Cited ante, p. 158.

(*t*) Ut stillicidium vel flumen recipiat quis in aedes suas, vel in aream, vel in cloacam.—Inst. 2, 3, 1, de serv.

receive the same flowing in a channel or conduit, and falling with force on his house.” Easements.

The civil as well as the English law (*u*) prohibited a man from projecting the wall or roof of his house over the boundary line of his neighbour's land, even though, by spouts or other means, the fall of water therefrom might be prevented: but a right to do so might be acquired by user; and when such projection did not, in any manner, rest upon the neighbour's soil, it was called *jus projiciendi*; where the projection was merely intended to protect the wall, either by creating shade against the heat of the sun, or keeping off the rain, it was the *jus protegendi*. “There is this difference between the right of projecting over and that of placing upon the neighbour's property—that the projection is carried out (*proveheretur*) in such a manner as not to rest anywhere (*nusquam requiesceret*), as a balcony or eaves; while the thing ‘placed upon’ is so put as to rest on something, ‘as a beam or rafter’” (*x*).

By the term watercourse is usually understood a stream of water flowing above ground; but questions of a similar nature arise with reference to the right to water flowing in a subterranean channel (*y*). In the case of a well, it is known that the supply of water is in general furnished by percolation through the neighbouring soil, so that the digging of a deeper well therein will divert the water from its course, and thus dry up the former well. If the right to water thus percolating is identical with that to water flowing above ground, it is manifest that ancient possession would be unnecessary to confer a title to water flowing to a well, in the course of nature, from a superior elevation. Subterranean channels.  
Percolating water.

In the first edition of this work it was said that the ancient flow of a stream without interruption by the occupant of land above, is evidence of his assent to the continuance of such flow (*z*); but that, with regard to underground filtrations, as their course—

(*u*) [See the next chapter, *ad init.*]

(*x*) *Inter projectum et immissum hoc interesse, ait Labeo: quod projectum esset id, quod ita proveheretur ut nusquam requiesceret, qualia mæniana, et suggrunda essent; immissum autem, quod ita fieret, ut aliquo loco requiesceret, veluti tigna, trabes, qua immitterentur.*—Dig. 50, 16, 242, de v. s.

(*y*) [As to what is a *known* underground stream, so as to be governed by

the same law as a stream flowing above ground, see *Black v. Ballymena Commrs.*, 17 L. R. Ir. Ch. D. 459; *Ewart v. Belfast Guardians*, 9 L. R. Ir. 172; *Bradford Corporation v. Ferrand*, [1902] 2 Ch. 655. The knowledge must be by reasonable inference from existing and observed facts, independently of facts ascertained by excavation or the opinions of experts. *Bradford Corporation v. Ferrand*, *ubi sup.*

(*z*) [As to artificial watercourses, see post, p. 295.]



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water.

and even their very existence—may be unknown to him, no such presumption ought to be drawn; because, as has been already shown (a), such a presumption ought not to be furnished by any enjoyment which is had either “vi—clam—or precario.” Moreover, supposing such actual knowledge to exist, it is difficult to see in what manner he could prevent the right being acquired. He could clearly maintain no action; and, in the majority of instances, he could not indicate his dissent, by cutting off the veins supplying the neighbouring well or fountain, without serious detriment to his own property. A further objection to an easement of this kind arises from the indefinite nature and great extent of the obligation which would be imposed by it; instances have occurred where excavations have had the effect of draining land, although at the distance of some miles.

*Cooper v.  
Barber.*

In *Cooper v. Barber* (b) the defendant had, for many years past, penned back a stream for the purposes of irrigation, the consequence of which was, that the water percolated through the neighbouring soil; the Court appear to have been of opinion that no right to cause such percolation was acquired by the user, and that the adjoining owner, on receiving injury from it upon erecting a house, might bring an action for it (c).

*Balston v.  
Bensted.*

The case of *Balston v. Bensted* (d) appears to be somewhat at variance with this doctrine: it may, however, be observed that the correctness of the ruling of Lord Ellenborough, at nisi prius, could not be questioned, as the cause was compromised. “The plaintiff and defendant were respectively owners of adjoining closes on the banks of the river Medway. As far back as could be recollected, there had been a gush of water from a hole in the plaintiff’s close, which used to run from thence, on the surface of the ground, to the river. About twenty-seven years before the action was brought, a bath was erected by the then occupier of the close near where the spring issued forth, and the water was conducted into it by a pipe. From that time till the present cause of action arose, the bath was amply supplied with water, and a considerable profit was derived from letting out the use of it to the public. In 1805 (the action being brought in 1808), the plaintiff purchased

(a) [Above, p. 228.]

(b) (1810), 3 Taunt. 99; 12 R. R. 604.

(c) [Cf. *Roberts v. Fellowes* (1906), 94 L. T. 279, where the fact that water had percolated through the banks of a river for a considerable period was made the

basis of a claim (which failed) to abstract from the river, by means of syphons and pipes, water equal in quantity to that alleged to have been formerly received by the claimant by such percolation.]

(d) (1808), 1 Camp. 463.

this close, and erected a paper manufactory upon it, for which a copious supply of spring water is essentially requisite. About the same time the defendant, becoming owner of the adjoining close, opened a stone quarry in it. As the excavations proceeded, considerable quantities of water were found, which interrupted the workmen. A deep drain was afterwards made to carry it off into the river, and the quarry was left dry. But in the meantime, the water flowing into the plaintiff's bath had been gradually decreasing, and, subsequently to the making of the drain, did not amount to more than an eighth or tenth part of its former quantity." For this diversion the action was brought. "The defence intended to be set up was, that the plaintiff had no exclusive right to the supply of water he claimed, as the principle on which twenty years' enjoyment of running water confers a right to it, appeared from the cases to be, that, after an adverse possession for so long a time, a grant was to be presumed from the owners of the land further up the stream; and such a grant could not be presumed here, as, previously to the drain being made, probably no individual knew that the plaintiff's spring was fed by water percolating through the strata in the close now occupied by the defendant." But Lord Ellenborough ruled, "That the only question was, whether the diminution of the supply of water to the plaintiff's bath had been caused by the drain dug by the defendant; and that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it." It was afterwards agreed, on the recommendation of the Court, that the water should be conveyed from the defendant's quarry to the plaintiff's bath in the manner to be directed by an arbitrator, and a juror was withdrawn.

The proposition laid down by Lord Ellenborough in the above case appears to include under the same general rule watercourses of all descriptions, whether the stream flows in the ordinary manner above ground, or only emerges after having made its way through the adjoining land below the surface of the earth.

Since the above observations were made, in the first edition of the work, the point in question, at least as to the extent of the identity, in point of legal incident, of open and underground streams, has received judicial determination by the Court of Exchequer Chamber. The case of *Acton v. Blundell* (e), decided

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*Acton v.  
Blundell.*

*Acton v.  
Blundell.*

(e) (1843), 12 M. & W. 324; 67 R. R. 361.

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*Acton v.  
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that the owner of land through which water flows in [an unknown] subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. Tindal, C. J., delivered the judgment of the Court, as follows: "The plaintiff below, who is also the plaintiff in error, in his action on the case, declared in the first count for the disturbance of his right to the water of certain *underground springs, streams, and watercourses*, which, as he alleged, ought of right to run, flow, and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain *spring or well of water* in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit, and enjoyment of the water of the said *spring or well* for the convenient use of his close. The defendants by their pleas traversed the rights in the manner alleged in those counts respectively. At the trial the plaintiff proved, that, within twenty years before the commencement of the suit, viz., in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that, by the first, the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause was tried directed the jury, that, if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and third pleas. Against this direction of the judge the counsel for the plaintiff tendered the bill of exceptions which has been argued before us. And after hearing such argument, and consideration of the case, we are of opinion that the direction of the learned judge was correct in point of law.

"The question argued before us has been in substance this:

whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a water-course flowing on the surface.

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“The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established. Each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases for any purposes of his own not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King’s Bench in the case of *Mason v. Hill* (*f*), and substantially is declared by the Vice-Chancellor in the case of *Wright v. Howard* (*g*); and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

“But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

“The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious; that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher

(*f*) (1833), 5 B. & Ad. 1; 2 Nev. & M. 747; 39 R. R. 354.

(*g*) (1823), 1 S. & S. 190; 24 R. R. 169.

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Blundell.*

lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of Fleta and of Blackstone,) the origin of which is lost by the progress of time; or it may not be unfitly treated as laid down by Mr. Justice Story, in his judgment in the case of *Tyler v. Wilkinson*, in the Courts of the United States (*h*), as ‘an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law.’ But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface. No man can tell what changes these underground sources have undergone in the progress of time. It may well be, that it is only yesterday’s date, that they first took the course and direction which enabled them to supply the well. Again, no proprietor knows what portion of water is taken from beneath his own soil; how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

“But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbour as he sends down to his neighbour below: he is neither better nor worse: the level of the water

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(*h*) 4 Mason’s (American) Reports, 401.

remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined: in the present case the nearest coal-pit is at the distance of half a mile from the well; it is obvious the law must equally apply if there is an interval of many miles.

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“Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

“No case has been cited on either side bearing directly on the subject in dispute. The case of *Cooper v. Barber* (i), which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but as this percolation had been insensible, and unknown by the plaintiff until the land was applied for building purposes, the

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(i) (1810), 3 Taunt. 99; 12 R. R. 604.

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Court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott* (k) is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement, for support or otherwise, over the adjoining land of his neighbour. It is said in that case, 'he has no right to load his own soil, so as to make it require the support of that of his neighbour, unless he has some grant to that effect.' It must follow, by parity of reason, that, if he digs a well in his own land so close to the soil of his neighbour, as to require the support of a rib of clay or of stone in his neighbour's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary; which is, in substance, the very case before us.

"The Roman law forms no rule, binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe.

"The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity. In the Digest, lib. 39, tit. 3, De aquâ et aquæ pluvie arcendæ, s. 12, 'Denique Marcellus scribit, Cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.'

"It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the

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(k) (1838), 3 M. & W. 230; 49 R. R. 578.

bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.

"We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the Court below must be affirmed. Judgment affirmed."

Though the Court studiously abstained from giving any opinion as to what their judgment would have been had the well been shown to be antient, the arguments the judges advance seem to show that the antiquity of the well would not have forfeited the right; [and the principle of the decision of the House of Lords in *Chasemore v. Richards*, post, has settled the point.

In *Dickinson v. Grand Junction Canal Co. (l)*, the Court of Exchequer laid down that an action would lie against a landowner for digging a well and so preventing subterraneous water from reaching a natural surface stream, which it would otherwise have reached, and this whether the water was part of an underground watercourse, or would have reached the stream by percolation through the intervening strata; but this opinion has been overruled by the decision of the House of Lords in *Chasemore v. Richards (m)*, affirming the judgment of the Court of Exchequer Chamber (*n*). The facts of that case appear from the opinion of the judges, which was acted on by the House of Lords. That opinion was as follows:—

"It appears by the facts that are found in this case, that the plaintiff is the occupier of an antient mill on the river Wandle, and that for more than sixty years before the present action he and all

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Opinion of  
the judges in  
*Chasemore v.  
Richards.*

(l) (1852), 7 Exch. 282.

(m) (1859), 7 H. L. C. 349.

(n) (1857), 2 H. & N. 168.



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[the preceding occupiers of the mill used and enjoyed, as of right, the flow of the river for the purpose of working their mill. It also appears that the river Wandle is, and always has been, supplied, above the plaintiff's mill, in part by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the river Wandle, part rising to the surface, and part finding its way underground in courses which continually vary. The defendant represents the members of the Local Board of Health of Croydon, who, for the purpose of supplying the town of Croydon with water, and for other sanitary purposes, sank a well in their own land in the town of Croydon, and about a quarter of a mile from the river Wandle; and pumped up large quantities of water from their well for the supply of the town of Croydon; and by means of the well and the pumping, the local board of health did divert, abstract, and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the river Wandle, and so to the plaintiff's mill; and the quantity so diverted abstracted and intercepted was sufficient to be of sensible value towards the working of the plaintiff's mill. The question is, whether the plaintiff can maintain an action against the defendant for this diversion, abstraction, and interception of the underground water.

"The law respecting the right to water flowing in definite, visible channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the judgment of the Court of Exchequer in the case of *Embrey v. Owen* (o). But the law, as laid down in those cases, is inapplicable to the case of subterranean water not flowing in any definite channel, nor indeed at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall. The inapplicability of the general law, respecting rights to water, to such a case, has been recognized and observed upon by many judges whose opinions are of the greatest weight and authority. In the case of *Rawstron v. Taylor* (p), Baron Parke, in the course of delivering judgment, says, 'This is the case of common surface water flowing in no definite channel, though contributing to the supply of the plaintiff's mill. The water having

(o) (1851), 6 Exch. Rep. 353; 86 R. R. 331. (p) (1855), 11 Exch. Rep. 382.

[no definite course, and the supply not being constant, the plaintiff is not entitled to it. The right to have a stream running in its natural direction does not depend upon a supposed grant, but is *jure naturæ*.’

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*Chasemore v.  
Richards.*

“In delivering the judgment of the Court of Exchequer in the subsequent case of *Broadbent v. Ramsbotham* (q), Baron Alderson observes, that ‘all the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which it falls from dealing with it as he may please, and appropriating it. He cannot do so if the water has arrived at and is flowing in some definite channel. There is here no water-course at all.’

“In the earlier case of *Acton v. Blundell* (r), the Court of Exchequer Chamber was of opinion that the owner of the surface might apply subterranean water as he pleased, and that any inconvenience to his neighbour from so doing was *damnum absque injuriâ*, and gave no ground of action.

“There is no case or authority of which I am aware that can be cited in support of the position contended for by the plaintiff, or in which the right to subterranean percolating water adverse to that of the owner of the soil came in question, except the *nisi prius* case of *Balston v. Bensted* (s), and *Dickinson v. The Grand Junction Canal Co.* (t).

“In the first of these cases, Lord Ellenborough is reported to have expressed an opinion that twenty years’ enjoyment of the use of water in any manner afforded an exclusive presumption of right. This opinion amounted only to the dictum of an eminent judge, followed by no decision upon the point, for the case ended in the withdrawal of a juror, and is directly at variance with the judgment of the Court of Exchequer in the other case, upon which the plaintiff relies, of *Dickinson v. The Grand Junction Canal Co.*, in which the Court declared (u) ‘that the right to have a stream running in its natural course is *not* by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*, and an incident of property as much

(q) (1855), 11 Exch. Rep. 602, 615.

(r) (1843), 12 Mee. & Wels. 324; 67 R. R. 361.

(s) (1808), 1 Camp. 463.

(t) (1852), 7 Exch. Rep. 282.

(u) 7 Exch. Rep. 299.

Percolating  
water.

*Chasemore v.  
Richards.*

[as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land.]

“In the case of *Dickinson v. The Grand Junction Canal Co.*, the very question now before your Lordships’ house arose, and that case is relied upon by the plaintiff as a decisive authority in his favour. The Court of Exchequer was of opinion that the company, by digging a well and pumping out the water, and so intercepting and diverting underground and percolating water which would otherwise have gone into a stream which flowed to the plaintiff’s mill, and was applied to the working of it, had become liable to an action for the infringement of a right at common law. In the same judgment, however, the Court refers (x) to the case of *Acton v. Blundell* apparently with approbation, and observes, ‘that the existence and state of underground water is generally unknown before a well is made; and after it is made there is a difficulty in knowing certainly how much, if any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to his neighbour. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterranean waters.’ But the Court, without at all adverting to this distinction which it had adopted, treated the case of underground percolating water as governed by the same rules as would obtain in the case of visible streams and watercourses above ground; and no remark or comment was made or reason assigned by the Court for arriving at a conclusion which not only does not seem warranted by the premises previously adopted, but is in effect hardly consistent with them. The plaintiff in that case was held to have a cause of action, independently of any infringement of a right at common law, by reason of the breach of an agreement between the parties and of an Act of Parliament; and a decision upon the right at common law seems not to have been necessary for determining the suit between the parties. These considerations greatly weaken the effect of the case of *Dickinson v. The Grand Junction Canal Co.*, as an authority against the defendant upon the point now in question; but it is an authority in his favour to show that a right to water is not by a presumed

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(x) 7 Exch. Rep. 300.

[grant from long acquiescence, but, if it exists at all, is jure naturæ, and that the rules of law that regulate the rights of parties to the use of water are hardly, or rather not at all, applicable to the case of waters percolating underground.

Percolating  
water.

*Chasemore v.  
Richards.*

“In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff’s mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff’s mill would be affected by any water percolating in and out of the defendant’s or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water? The Court of Exchequer, indeed, in the case of *Dickinson v. The Grand Junction Canal Co.*, expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is jure naturæ. If so, à fortiori, the right, if it exists at all, in the case of subterranean percolating water, is jure naturæ, and not by presumed grant, and the circumstance of the mill being ancient would in that case make no difference.

“The question then is, whether the plaintiff has such a right as he claims jure naturæ to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affects the working of the plaintiff’s mill. It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a way into it had no sensible effect upon the quantity of water in the river

Percolating  
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*Chasemore v.  
Richards.*

[which ran to the plaintiff's mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water, by the united effect of all the wells, as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them, and, if any, which—for it is clear that no action could be maintained against them jointly?

“In the course of the argument one of your lordships (Lord Brougham) adverted to the French Artesian well at the Abattoir de Grenelle, which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rain water as it fell into a pond; nor would he have a right to intercept its fall, before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground and flowed to the plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the river Wandle; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its way into the river, and increasing its quantity, to the detriment of the plaintiff's mill. *Such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable; and we therefore answer your lordships' question in the negative.*”

The judgment of the House of Lords was in favour of the defendant, and affirms the principles laid down in the above opinion (y).

(y) And see *English v. Metropolitan Water Board*, [1907] 1 K. B. 588. The question sometimes arises, whether a man is liable, not for intercepting, but for causing the flow of subterranean water

into his neighbour's land. As to this, see *Smith v. Kenrick* (1849), 7 C. B. 515; 78 R. R. 745, and other cases on the law of negligence.

[The right to intercept underground water has, perhaps, been carried furthest in *Bradford Corporation v. Ferrand* (z), where it was held that underground water, even though flowing in a defined channel, may be intercepted and abstracted if the course of that underground channel is not known and cannot be ascertained except by excavation. Percolating water.

The principle of *Acton v. Blundell* applies to the case of draining off the water already collected in a well, and not merely to that of intercepting the water which would otherwise have flowed into it. See the case of *New River Co. v. Johnson* (a), in which it was attempted without success to distinguish the two cases, and so to narrow the effect of the authorities already cited. Draining stored water.

And in *The Salt Union, Ltd. v. Brunner, Mond & Co.* (b), the principle of *Acton v. Blundell* was applied, although the underground liquid drawn off by the defendants in the course of pumping operations carried on by them on their own land was brine mainly formed by the dissolution of rock-salt in the plaintiffs' salt mines, and although it was found as a fact that the defendants had, by such operations, abstracted a large quantity of salt from the beds of rock-salt belonging to the plaintiffs, and that if the defendants' brine-pumping was continued more of the plaintiffs' rock would be dissolved, and the salt abstracted therefrom. Notwithstanding these facts, it was held that the defendants were guilty of no actionable wrong. *Salt Union, Ltd. v. Brunner, Mond & Co.*

It results from the series of authorities already referred to, that no action will lie against a man who, by digging wells or cutting drains in his own land, thereby drains his neighbour's land also, whether by intercepting the flow of the water percolating through Conclusion.

(z) [1902] 2 Ch. 655.

(a) (1860), 2 E. & E. 435. In *Ennor v. Baricell* (1860), 2 Giff. 410; on appeal, 1 De G., F. & J. 529, according to the report, it might be supposed that the Vice-Chancellor was of opinion, that the question, whether the principles established by *Chasemore v. Richards* are applicable to a particular case, is affected by the distance through which the water would have to percolate before reaching the plaintiff's land; but it is impossible to reconcile this view with the existing authorities, and probably

it would be found that the opinion expressed by his Honour on that part of the case amounted really to a finding of fact, that the interruption complained of was like that of the interruption of a natural stream at its very source (see ante, p. 249); but whether the facts would justify such a finding is a question which cannot be here discussed.

(b) [1906] 2 K. B. 822. As to subsidence caused by the pumping of brine, see the Brine Pumping (Compensation for Subsidence) Act, 1891.

Percolating  
water.

Conclusion.

[the pores of the soil, and which, but for such digging or draining would have reached his neighbour's land, or by causing the water already collected in fact on his neighbour's soil to percolate away from and out of it; and from the case last cited above it appears that the same statement of the law holds good, even though the liquid intercepted or caused to percolate away abstracts along with it some ingredient of the neighbour's soil of commercial value (c).

"The percolating water below the surface of the earth is a common reservoir or source in which nobody has any property, but of which everybody has, as far as he can, the right of appropriating the whole" (d).

In *Grand Junction Canal Co. v. Shugar* (e), it appears, in the report contained in the Law Reports, that Lord Hatherley, L. C., held that, although a landowner will not in general be restrained from drawing off the subterranean water in the adjoining land, yet he will be restrained if in so doing he draws off the water flowing in a defined surface channel through the adjoining land. It is difficult to reconcile this decision with those referred to above if the facts showed only a withdrawal of underground water, but it appears that the case was decided on the footing that there was a direct tapping of the defined surface channel (f).

Drainage by  
mine-owner.

The same law applies where the surface and the mines beneath it belong to different owners, and where the surface has been granted and the mines retained. The owner of the mine is not responsible if, in working the mines, he drains the water from the surface. "The grant of the surface cannot carry with it more than the absolute ownership of the entire soil would include. The absolute ownership is held not to include a right to be protected from loss of water by percolation into openings made in the soil of the neighbouring owner. How then can the grant of the surface only be held to include such a protection? To hold otherwise might not improbably result in rendering the reservation of mines and minerals wholly useless. Percolation of water into mines is an

(c) The liquid must, however, be of the nature of water; the same rule does not hold good for example in the case of natural pitch, see *The Trinidad Asphalt Co. v. Ambard*, [1895] A. C. 594.

(d) Per Brett, M. R., in *Bullard v. Tomlinson* (1885), L. R. 29 Ch. Div. at p. 121. Cf. *R. v. Metropolitan Board* (1863), 3 B. & S. 710; *Mayor of Brad-*

*ford v. Pickles*, [1895] A. C. 587.

(e) (1871), L. R. 6 Ch. 483.

(f) See the same case reported 24 L.T. 402; and see *Jordeson v. Sutton, South-coates and Drypool Gas Co.*, [1899] 2 Ch. 217, per Vaughan Williams, L. J., at p. 251; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588, at p. 601.

[almost necessary incident of mining. And if the grant of the surface carries with it a right to be protected from any loss of surface water by percolation, the owner of the surface would hold the owner of the mines at his mercy; for he would be entitled by injunction to inhibit the working of mines at all. It is not at variance with this view that the case of *Whitehead v. Parks* (g) was decided, because in that case there was a lease and a distinct grant of the injured springs eo nomine" (h).

Percolating  
water.

If the grant of the surface was made for some express purpose necessarily and obviously requiring the continuance of a supply of surface water, the principle laid down in the above passage might come into conflict with the principle involved in the decisions cited above (i) upon the maxim that a man may not derogate from his own grant. It is conceived, however, that even in such a case the surface owner could not claim a continuance of the surface water so as to prevent the working of the minerals. The reservation of the minerals would, it is thought, include all the natural and legal incidents consequent upon the working necessary to win them.

Grant of  
surface for  
express  
purpose.

Where land was granted for building subject to a chief rent, and cottages were built upon it, and the owner afterwards granted the adjacent land to the builders of a church, whose excavations so far drained the land on which the cottages stood that the soil subsided and they became cracked and damaged, the church builders were held not responsible. The Court said, "although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil if for any reason it becomes necessary or convenient for him to do so. It may indeed be, that when one grants land to another for some special purposes,—for building purposes, for example,—then since, according to the old maxim, a man cannot derogate from his own grant, the grantor cannot do anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been." They held that there was nothing in the grant to the plaintiff to warrant the inference of an implied condition to prevent the defendant from doing

Water  
supporting  
buildings.

(g) (1858), 2 H. & N. 870.

(h) *Ballacorkish, &c. Co. v. Harrison* (1873), L. R. 5 P. C. 49; see *Littledale*

*v. Earl of Lonsdale*, [1899] 2 Ch. 233, note.

(i) p. 113, note (g).



Percolating  
water.

[with the adjacent land what was incidental to its ordinary use, viz., draining it in order to render it more capable of being adapted to building purposes (*k*).

In two recent cases the plaintiff has succeeded in actions claiming relief in respect of subsidence, but these cases do not, when examined, conflict with the last mentioned decision.

*Jordeson v.  
Sutton, South-  
coates and  
Drypool Gas  
Co.*

In *Jordeson v. Sutton, Southcoates and Drypool Gas Co. (l)*, the defendants carried out excavation works upon their property, which adjoined the plaintiff's property, and in the course of such excavation cut through a stratum of running silt, with the result that the plaintiff's houses erected upon his adjoining property subsided. The evidence was conflicting as to whether the stratum of silt could truly be considered to be muddy water or wet sand, and in effect the decision turned upon the view taken by a majority of the Court of Appeal as to the conclusion to be drawn from this evidence, two of the learned Lords Justices (*m*) holding that the plaintiff's land was supported, not by a stratum of water, but by a bed of wet sand, whilst the third (*n*) came to the conclusion that the withdrawal of subterranean water support had caused the subsidence. The decision of a majority of the Court was therefore based upon the ordinary law with regard to the right to support (*o*), and not upon the question now under consideration.

*Trinidad  
Asphalt Co.  
v. Ambard.*

*The Trinidad Asphalt Co. v. Ambard (p)*, was an appeal from a decree of the Court of Appeal of the Supreme Court of Trinidad and Tobago. In that case the subsidence of the plaintiffs' land was caused by the oozing and escape of pitch, which formed the main ingredient of the plaintiffs' land, consequent upon excavations on the defendant's adjacent lands. The judgment of the Judicial Committee of the Privy Council was in favour of the plaintiffs, but the grounds of the decision were based upon the conclusion that the pitch or asphalt which escaped from beneath the plaintiffs' land was not in the nature of water. "Asphaltum," said Lord Macnaghten in delivering the judgment, quoting an observation from the judgment of the learned Chief Justice before whom the action was originally tried, "is a mineral, not water."

(*k*) *Popplewell v. Hodkinson* (1869), L. R. 4 Exch. 248; cf. *Elliot v. North-Eastern Railway* (1863), 10 H. L. 333.

(*l*) [1899] 2 Ch. 217; affirming the decision of North, J., [1898] 2 Ch.

614.

(*m*) Lindley, M. R., and Rigby, L. J.

(*n*) Vaughan Williams, L. J.

(*o*) Post, Chap. IV.

(*p*) [1899] A. C. 594.

[But, although a man is not bound to prevent the water percolating through his land from coming to his neighbour, or may drain the water from his neighbour's land, he cannot foul the water percolating from his land to his neighbour's injury (*q*).] Percolating  
water.  
Fouling.

A grant of all streams of water that might be found in land, when at the time of the grant there was but one stream and several wells, was held to include the underground water in the land; the grantor could not, nor could any one claiming under him, do anything the effect of which could be to drain such underground water from the land (*r*). Grant of  
water.

But a grant of an artificial watercourse as shown in a plan, with the stream and springs flowing into or feeding the same, has been held to be a grant of the artificial channel and of the definite springs and streams feeding it, and of such other water as should run into and down the channel as it stood, and not to justify the grantees in enlarging the channel so as to carry off more water (*s*).]

By the civil law every man had a right to dig in his own land for the purpose of improving it, although he should thereby intercept the water, which supplied his neighbour's fountain (*t*). Civil law.

With regard to watercourses altogether artificial, there seems no reason to doubt that the long-continued submission of the servient owner to the discharge of water upon his tenement, or to the conducting of it through his land by the owner of the dominant tenement, will confer the right to continue the discharge of the water, or to continue to receive the supply of it, that is, to continue to receive the supply of it through the land of the servient owner (*u*). Artificial  
watercourses.

(*q*) *Wood v. Waud*, below, p. 304; *Hodgkinson v. Ennor* (1863), 4 B. & S. 229; *Womersley v. Church* (1867), 17 L. T., N. S. 190; *Ballard v. Tomlinson* (1885), 29 Ch. Div. 115.

(*r*) *Whitehead v. Parks* (1858), 2 H. & N. 870.

(*s*) *Taylor v. Corporation of St. Helens* (1877), L. R. 6 Ch. Div. 264. Cf. *McNab v. Robertson*, [1897] A. C. 129.

(*t*) Marcellus scribit, Cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.—Dig. 39, 3, 1, § 12, de aq. et aq. pl. arc.

Si in meo aqua irrumpat, quæ ex tuo

fundo venas habeat si eas venas incidere, et ob id desideret ad me aqua pervenire, tu non videris vi fecisse, si nulla servitus mihi eo nomine debita fuerit; nec interdicto "Quod vi aut clam" teneris.—Dig. 39, 3, 21.

Vide etiam Dig. 39, 2, 24, § 12, de damno infecto.

(*u*) Since the first edition of this book it has been so laid down in *Magor v. Chadwick* (1840), 11 A. & E. 571, [which on this point is not touched by *Wood v. Waud* (1849), 3 Exch. 748; 77 R. R. 809. And to the same effect are *Drewett v. Sheard* (1836), 7 C. & P. 465; 48 R. R. 797; *Sutcliffe v. Booth* (1863), 9 Jur. N. S. 1037; 32 L. J. Q. B. 136; *Ivimey v. Stocker* (1866), L. R. 1 Ch.

Right to  
receive water.

A question of much greater difficulty arises in the case of a discharge of water, when the servient owner seeks to compel the dominant to continue it, and to prevent him from altering its course, and thus attempts to invert their relative positions, and himself to become dominant.

The chief objection to such a claim is, that there is no submission (*patientia*) by the dominant owner to the enjoyment of the water had by the servient—he discharges the water for his own convenience, and to what use the other may apply it when so discharged is immaterial to him—he has no means of preventing such an application but by discontinuing the discharge, and thus depriving himself of the benefit of his own easement.

It may be said that, according to this argument, the party discharging the water could acquire no right where the other party immediately on receiving it applied it to some useful purpose—as the latter had submitted to it only because it was advantageous to himself. The answer to this objection is, that there is a submission by the receiving party, which does not exist in the case of the discharging party. The active step, the immission of water, is the act of the latter. It is optional with the servient owner to submit to the immission or to oppose it. The motives which influence him to do one or the other are immaterial. The real inquiry in such cases must be by whose act the water was first caused to flow.

Supposing it to be unknown by which party the flow of water was caused, and that the flow is beneficial to the owners of both tenements,—to the one by the discharge, to the other by the use to which he puts the water on receiving it,—it would probably be presumed that a reciprocal easement did exist.

[The proper inference from the user of the water and all the surrounding circumstances may be that the artificial watercourse was originally constructed upon the terms that it was to be treated as a natural stream, and that the rights of the riparian owners are to be regulated accordingly (x).]

In ascertaining the rights with regard to artificial watercourses, regard must be had to “first, the character of the watercourse,

396; *Holker v. Porritt* (1875), L. R. 10 Exch. 59; *Rameshur Pershad Navain Singh v. Koonj Behari Pattuk* (1878), L. R. 4 App. Cas. 121; *Roberts v. Richards* (1881), 50 L. J. Ch. 297; see 51 L. J. Ch. 944; and *Baily & Co. v.*

*Clark, Son and Morland*, [1902] 1 Ch. 649. Cf. *Kensit v. Great Eastern Railway* (1884), L. R. 27 Ch. Div. 122.]

(x) *Baily & Co. v. Clark, Son and Morland*, [1902] 1 Ch. 649.

[whether it is temporary (y) or permanent; secondly, the circumstances under which it was presumably created; and thirdly, the mode in which it has been in fact used and enjoyed" (z).]

Right to  
receive water.

The important case of *Arkwright v. Gell* (a) turned upon the right of the party receiving water drained from a mine, to compel the owners of the mine to continue such discharge. The Court decided that no such right existed in that case.

*Arkwright v.  
Gell.*

"The plaintiffs in this case," said Lord Abinger, on delivering the judgment of the Court of Exchequer, in the case of *Arkwright v. Gell*, "are the occupiers of certain cotton mills, at Cromford, in the county of Derby, and complain of an illegal diversion, by the defendants, of the water to which they were of right entitled for the supply of their mills. The defendants by their pleas deny that right, and also insist that they have not been guilty of any illegal diversion. A special case was reserved on the trial, for the opinion of the Court, stating a great number of documents and facts, upon which the Court are not merely to give their judgment on matters of law, but to take the office of the jury, by determining whether any and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law with an inference of fact only, which inference might have been varied by a very slight circumstance.

"From the facts and documents, however, the case appears to be this:—In the beginning of the last century, certain adventurers had in part constructed, and were proceeding to continue a sough, now called the Cromford Sough, for the purpose of draining a portion of the mineral field in the wapentake of Wirksworth. How they acquired the right to make that sough is not stated; it was, however, without doubt, either by virtue of the custom of mining there prevalent, or by the express licence of the owner of the soil through which it was made. The adventurers received their remuneration in the shape of a certain portion of the ore raised from the mines within the level lying near and benefited by the sough (technically called, within the title of the sough) in consequence of an agreement with the proprietors of the mines. The right to this easement, with its

(y) Cf. *Burrows v. Lang*, [1901] 2 Ch. 502; *McEvoy v. Great Northern Rail. Co.*, [1900] 2 Ir. R. 325; *Hanna v. Pollock*, [1900] 2 Ir. R. 664.

(z) *Baily & Co. v. Clark, Son and Morland* (*ubi sup.*), per Stirling, L. J., at p. 668.

(a) (1839), 5 M. & W. 203.

Right to  
receive water.

*Arkwright v.  
Gell.*

accompanying advantages, appears to have been the subject of sale and conveyance in that district; for in 1738 the proprietors leased it for 999 years for a pecuniary consideration, with a reservation by way of rent of a part of the profits. Mr. Arkwright, under whom the plaintiffs claim, and all whose rights they may be assumed to have had, by demise from him, when the cause of action accrued, became, in 1836, the purchaser of the reversion expectant on the determination of that lease, and he also acquired a portion of the interest of the lessees, by a conveyance from some of them. It does not appear to us that this circumstance affects the question between the parties to this suit.

“After the sough had been constructed, and a constant flow of water thereby conducted from the mines, the late Sir Richard Arkwright, the father of Mr. Arkwright, obtained, in the year 1771, a lease for eighty-four years, from the lord of the manor of Cromford (who, upon the special case, is alleged to have been the owner of the land through which the Cromford Sough was made, and also the owner of a piece of land between the mouth of the sough and the brook into which the water was conveyed), of that piece of land, the brook, and the ‘stream of water issuing and coming from Cromford Sough,’ with the right of erecting mills on the piece of land. In 1772, Sir Richard Arkwright erected extensive cotton mills thereon, and in April, 1789, he purchased that land and the fee-simple in the mills and the manor of Cromford, including the lands through which the Cromford Sough was made.

“In the meantime, another company of adventurers had begun to construct another mining sough, called the Meerbrook Sough, on a much lower level in the adjoining township of Wirksworth. The defendants represent and have all the rights of that company of adventurers, and must, like the proprietors of the Cromford Sough, be assumed to have acted, either by virtue of a mining custom or by express licence of the owner of the soil, confirmed by the Cromford Inclosure Act in 1802, and also to have had the authority, prior or subsequent, of the owners of the mines drained by that sough, and contributing a certain portion of the ore by way of recompense. These facts are not distinctly found, but we think we must infer that such was the case, and consequently that the defendants stand in the same relation to the plaintiffs as if the owners of those mines had

themselves, with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they made the sough themselves, or through the agency of the adventurers, is immaterial. In 1813 the defendants, being themselves proprietors of mines drained by it, extended the Meerbrook Sough, having made an agreement with the then proprietors of the Cromford Sough, and of other mines unwatered by it, and which appeared to have been then worked down to the level of that sough, for the purpose of regulating their respective rights, and the recompense to be paid by the latter to the former set of adventurers for the benefit to be derived by them by the extension of this sough, and the unwatering by means of it of a further portion of their mineral field below the level of the former sough.

Right to  
receive water.  
*Arkwright v.  
Gell.*

"The new sough was, therefore, constructed by the consent of some, if not all, of those mine owners who had formerly used the Cromford Sough, and in part for their benefit; and this circumstance places the defendants in the same position in respect to the diversion of the surplus water as if they themselves had been owners of part of the mineral field formerly drained by the Cromford Sough, and were now proceeding to unwater a further portion of the same field by means of the new sough. When the Meerbrook Sough was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened, let off the water which would otherwise have been discharged by the Cromford Sough, and thereby prevented it from flowing to the plaintiff's mill.

"In 1825 an arrangement was made for the mutual accommodation of Mr. Arkwright and the Meerbrook Sough proprietors, which was not to affect their rights, and which, having been determined in 1836, left them in the same situation as if it had never been made; and the gates being removed, in order to carry the sough further in that direction, and the water thereby diverted from the plaintiff's mills, the defendants are in the same situation as if no flood-gates had been made, and as if in the construction of their sough for the purpose of draining another portion of the mineral field they had broken the natural barrier which pent the water up and made it flow through the Cromford Sough, and so caused the water to pass out at a lower level through the Meerbrook Sough; and the question is—whether the defendants by so

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doing are rendered liable to an action at the suit of the plaintiffs. This question, which was most elaborately and ably argued during the last term, appears to us, strictly speaking, to be one as much of fact as of law; and, when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty.

"The stream upon which the mills were constructed was not a natural watercourse, to the advantage of which flowing in its natural course the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill* (b) and in other cases; this was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was from the very nature of the case, of a temporary character (c), having its continuance only whilst the convenience of the mine-owners required it, and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted.

"That Sir Richard Arkwright contemplated the discontinuance of this watercourse (if the question of his knowledge in this state of things can be material) there is evidence in the lease made in 1771, which contains a provision for a supply from the river in the event of the stream being lessened or taken away by the construction of another sough: and also that such an event was not improbable appears from the clause in the 2nd Cromford Canal Act, 30 Geo. 3, c. 56, s. 4. What, then, is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse at common law, and independently of the effect of user under the recent statute 2 & 3 Will. 4, c. 71? He would only have a right to use it for any purpose to which it was applicable so long as it continued there. A user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in

(b) (1833), 5 B. & Adol. 1.

(c) The meaning of these words was

discussed and explained in *Burrows v. Lang*, [1901] 2 Ch. 502, at p. 508.

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Gill.*

order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely,—a course so expensive and inconvenient that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity as a matter of right.

“Several instances were put in the course of the argument of cases analogous to the present, in which it could not be contended for a moment that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years. Is it possible from the fact of such a user to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen himself and the assigns of his mine with the obligation to keep a steam-engine for ever, for the benefit of the landowner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not: in all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin; though, as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired. And so, in the present case, Sir Richard Arkwright, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him; and if there had been no grant he would, by twenty years’ user, have acquired the like right as against such owner; but the user even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would



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afford no presumption of a grant at common law as against the owners of the mines.

"It remains to be considered whether the statute 2 & 3 Will. 4, c. 71, gives to Mr. Arkwright and those who claim under him any such right, and we are clearly of opinion that it does not. The whole purview of the Act shows that it applies only to such rights as would before the Act have been acquired by the presumption of a grant from long user. The Act expressly requires enjoyment for different periods '*without interruption*,' and therefore necessarily imports such a user as could be *interrupted* by some one '*capable of resisting the claim*'; and it also requires it to be '*of right*.' But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode: and as against them it was not '*of right*'; they had no interest to prevent it: and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water so long as their mines were freed from it.

"We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel either by the presumption of a grant, or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority, and therefore our judgment must be for the defendants."

*Magor v.  
Chadwick.*

In *Magor v. Chadwick* (d) the plaintiffs complained of the pollution of a stream running to their brewery. The defendants traversed the plaintiffs' right to the stream. "It appeared that the stream or watercourse claimed by the plaintiffs flowed from the mouth of an adit, or underground passage, in adjoining lands not belonging to the plaintiffs, and which had been originally made, upwards of fifty years ago, for the purpose of clearing the water from a certain mine by the owner of the mine, but that the mine had not been worked for more than thirty years past; that after the working was discontinued the plaintiffs availed themselves of the water coming along this channel to brew beer, and, after clearing the adit themselves, had for more than twenty years obtained from it pure water for that purpose, and had erected a brewery

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(d) (1840), 11 A. & E. 571.

there at a great expense. It was admitted that, at the time when the adit was originally made and the mine worked, the water must have been unfit for the uses to which the plaintiffs now applied it.

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“The defendants were owners of other mines (copper mines), and had lately used the old adit for the purpose of draining them, by which the water had again been made foul and unfit for brewing. It was not shown that they were connected with or claimed under the owners of the adit or mine, or of the lands through which it flowed.”

The learned judge also stated to the jury that, “in the absence of custom, artificial watercourses are not distinguished in law from such as are natural: that the same rules apply to them; and that twenty years’ enjoyment might therefore warrant the jury in finding in favour of the right.”

The jury found a verdict for the plaintiffs. A rule nisi for a new trial was granted, and after argument the Court of Queen’s Bench took time to consider their judgment, which was delivered by Lord Denman. After some prefatory matter not material to this point, his Lordship proceeded. “On the argument for a new trial, the defendants took other ground. They said that the artificial nature of the adit, and the known practice of all the mineral districts, were strong evidence, even in the absence of a custom, to show that the plaintiffs’ enjoyment was not of right; because they must have known that the owner of the mine had made the watercourse for his own convenience, and had ceased to work it with the intention of resuming that work whenever it suited his interest, and with all the rights of throwing in dirt and rubbish which usually attend these operations. And great stress was laid on the recent decision in the Exchequer of *Arkwright v. Gell* (e), where the Court, placed by consent in the situation of a jury, declined to draw the inference of an exercise by right, because they thought the circumstances would not have warranted the presumption of a grant. So, it was said, the universal mode of proceeding in the mining district would have been material to show that the plaintiffs used the water with no idea of having a right to it, but were merely taking advantage of the accidental non-user of the adit for such time as it happened to be useful to them.

“We are by no means prepared to say that the circumstances under which a watercourse has been enjoyed may not prove it to

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(e) (1839), 5 M. & W. 203.

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*Magor v.  
Chadwick.*

have been without right; or that a universal practice in the neighbourhood might not lead to fix the party with knowledge that those who cleared a mine by an adit notoriously reserved to themselves the right of working the mine at any time. But this view was never pressed on the learned judge on the trial, the defendants relying on proof of their custom, and electing to stand or fall by the opinion which the jury might form upon it. The point was properly raised; and the complaint is not even that the verdict was wrong on the evidence put forward, but merely that the defendants themselves did not rest their case on such strong facts as they might.

"The imputed misdirection is, that the law of watercourses is the same, whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to us quite indefensible. And the late case in the Exchequer leads to no such conclusion."

*Wood v.  
Waud.*

[The case of *Magor v. Chadwick* has, however, been commented upon and explained, in the case of *Wood v. Waud* (*f*). In that case the waters from the workings of a colliery (partly pumped up and partly caused by the overflow of an old coal-pit which had become filled with water) had for upwards of twenty years flowed through two artificial subterraneous channels; one of which, called the Bowling Sough, passed directly through the plaintiffs' land; the other, called the Low Moor Sough, passed into a natural stream called the Bowling Beck, which, so augmented, passed through the plaintiffs' land. The defendant, having works on the banks of each channel above the points where they respectively arrived at the plaintiffs' land and at the Bowling Sough, diverted the water of each of them. The channels were subterraneous, but the Court determined the question as it would have stood if they had been surface streams. The judgment of the Court contains a full exposition of the law affecting artificial watercourses, as will be seen from the following passage:—"This question is not with respect to the rights of the plaintiffs as against the owners of the collieries which the Soughs relieve from water, but as to the rights of the plaintiffs and defendants inter se; and it will be better to

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(*f*) (1849), 3 Exch. 748; 77 R. R. 809.

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receive water.

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Waud.*

[consider, in the first place, how they would stand if the streams were not underground. With respect to a claim of right as against the colliery owners, if it be true that a right was gained to these streams by the riparian proprietors as against them, in consequence of their acquiescence for twenty years by virtue of the presumption of a grant, or of Lord Tenterden's Act (2 & 3 Will. 4, c. 71), there would be no difficulty as to the right of the riparian proprietors against each other or against other persons. But Mr. Cowling admitted that a grant could not be presumed, and that he should have great difficulty in establishing the right under Lord Tenterden's Act. This Court, as then constituted, much considered that subject in the case of *Arkuright v. Gell*. We have again considered it, and are satisfied that the principles laid down as governing that case are correct, and were properly acted upon in it, by deciding that no action lay for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character; and where the interruption was by the party who stood in the situation of the grantor. The Court of Queen's Bench, in a subsequent case, *Magor v. Chadwick*, supported a verdict for the plaintiff, for the disturbance of a right to the enjoyment of a stream under circumstances somewhat similar; but in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor anyone claiming under him, and he had not put an end to it by altering the mode of working his mines; but, what is more important, the action was not brought for abstracting, but for fouling,—a species of injury which does not stand on the same footing; for, though the possessor of the mine might stop the stream, it does not follow that he, or any other, could pollute it whilst it continued to run; and besides, from the course which the cause took at *nisi prius*, the precise question which we have now to consider does not appear to have called for decision. The two cases are therefore distinguishable; and the expressions used by the learned judges in that case as to the similarity of natural and artificial streams, are to be understood as applicable to the particular case.

"We entirely concur with Lord Denman, C. J., that 'the proposition that a watercourse, of whatever antiquity and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been

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[originally artificial, is quite indefensible'; but, on the other hand, the general proposition that, under all circumstances, the right to watercourses arising from enjoyment is the same whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created (*g*). The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variation.

"The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land (*h*). The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right. If, then, this had been a question between the plaintiffs and the colliery owners, it seems to us that the plaintiffs could not have maintained an action for omitting to pump water by machinery (and in this the Court of Queen's Bench and Exchequer entirely agreed in the case above cited). Nor, if the colliery proprietors had chosen to pump out the water from the pit, from whence the stream flowed continuously, and caused what is termed the natural flow to cease, could the plaintiffs, in our opinion, have sued them for so doing. But this case is different. The water has been permitted to flow in an artificial channel by the colliery owners, and for sixty years. And the question is one of more difficulty, whether the plaintiffs can sue another person, a proprietor and occupier of the land above and through which the sough passes

(*g*) *Baily & Co. v. Clark, Son and Morland*, [1902] 1 Ch. 649. See as to the case of a drowned mine, and the temporary support occasioned by the water, the observations of Wood, V.-C., in

*N. E. R. v. Elliott* (1860), 29 L. J. 812; 1 J. & H. 145.

(*h*) See *Greatrex v. Hayward* (1853), 8 Exch. 291; 91 R. R. 493; *Hanna v. Pollock*, [1900] 2 Ir. R. 664.

[not claiming under or authorized by them, for diverting the water.

Right to  
receive water.

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Waud.*

“The case of the Bowling Sough differs from the Low Moor Sough in this, that the plaintiffs in 1838 used the water of the Bowling Sough, where it passes through their land, by making a communication to their reservoir, for working the mill. Have the plaintiffs a right to the water of this sough? It appears to us to be clear that, as they have a right to the Bowling Beck (the natural stream) as incident to their property on the banks and bed of it, they would have the right to all the water which actually formed part of that stream, as soon as it had become part (*i*), whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands or of colliery works. And if the proprietors of the drained lands or of the colliery works augmented the stream by pouring water into it, and so gave it to the stream, it would become part of the current; no distinction could then be made between the original natural stream and such accessions to it.

Right to  
natural  
stream in-  
cludes right to  
all ordinary  
accessions.

“But the question arises with respect to an artificial stream not yet united to the natural one.

“The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the waters from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the waters into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed; each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water until it has reached his own land; he has no right to compel the owners above to permit the water to flow through their lands for his benefit; and, consequently, he has no right of action if they refuse to do so.

“If they pollute the water, so as to be injurious to the tenant below, the case would be different.

“We think, therefore, that the plaintiffs have no right of action for the diversion of that water. The question as to the Low Moor Sough is less favourable to the plaintiffs, for this sough does not pass through their land at all.

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(i) See *Dudden v. Guardians of Clutton Union* (1857), 1 H. & N. 627.

Right to  
receive water.

*Wood v.*  
*Waud.*

*Greatrex v.*  
*Hayward.*

[“ We are of opinion, that, if the plaintiffs would not be entitled to the water of the soughs if above ground, their being below ground in this case would probably make no difference. It does not certainly make a difference in favour of the plaintiffs” (*j*).

In accordance with the principles laid down in *Wood v. Waud*, it was held by the Court of Exchequer in *Greatrex v. Hayward* (*k*), that the flow of water, from a drain made for agricultural improvements, for twenty years, did not give a right to the person through whose land it flowed to the continuance of the flow, so as to preclude the proprietor of the land drained from altering the level of his drains for the improvement of his land, and so cutting off the supply (*l*). *Martin, B.*, said, in *Raustron v. Taylor* (*m*), that the motive was quite immaterial; and this, no doubt would appear to be so, having regard to the principle laid down in *Wood v. Waud*, thus: “The right to artificial watercourses, as against the party creating them, depends upon the character of the watercourse, whether it be of a permanent or a temporary character, and upon the circumstances under which it was created” (*n*).

*Waller v.*  
*Mayor of*  
*Manchester.*

In *Waller v. Mayor of Manchester* (*o*), provision had been made in a waterworks Act for an artificial watercourse, as compensation to the riparian proprietors for the diversion of the natural stream. The Corporation of Manchester were empowered, subject to the provisions of the Act, to construct a reservoir and intercept the waters of the river Ethrow. They were not to divert the water until the reservoir was completed and filled with water, and were to discharge out of the reservoir a specified quantity per day. It was held that there was no obligation to discharge the water until the reservoir was completed, although they had diverted the water for the purposes of their works, and that a proprietor could only sue them for diverting the natural stream.

*Gaved v.*  
*Martyn.*

In *Gaved v. Martyn* (*p*), the plaintiff claimed a right to three artificial watercourses. One had been originally made by his predecessor in title, with the licence of the proprietor of the

(*j*) Cf. *Wardle v. Brocklehurst* (1859), 1 E. & E. 1053, at p. 1060; *Proprietors of Staffordshire and Worcestershire Canal Navigation v. Proprietors of Birmingham Canal Navigation* (1866), L. R. 1 H. L. 254; *Brymbo Water Co. v. Lester's Lime Co.* (1894), 8 R. 329.

(*k*) (1853), 8 Exch. 291; 91 R. R. 493.

(*l*) *Hanna v. Pollock*, [1900] 2 Ir. R. 664.

(*m*) (1855), 11 Exch. 384.

(*n*) *Per Parke, B.*, in *Broadbent v. Ramsbotham* (1856), 11 Exch. 611; *Baily & Co. v. Clark, Son and Morland*, [1902] 1 Ch. 649.

(*o*) (1861), 6 H. & N. 667.

(*p*) (1866), 19 C. B. N. S. 732.

[stream from which the water was derived; and he was held not entitled to it, because the enjoyment was precarious. The second had been made adversely, for the enjoyment of his works, and used for twenty years; to this he was held entitled. The third was a drain made by miners, under whom the defendants claimed; and, as they had never abandoned their control over it, the plaintiff was held not entitled to its continuance.

Right to  
receive water.

*Gaved v.  
Martyn.*

"If," said Erle, C. J., in delivering the judgment of the Court upon the last point, "there is uninterrupted user of the land of the neighbour for receiving the flow (of an artificial stream) as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbour's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbour's land has become subject to the servitude of being bound to send on the water to the land of the neighbour below. The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbour. A right of way is no evidence that the party entitled thereto is under a duty to walk; nor a right to eaves-dropping on the neighbour's land, that the party is bound to send on his rain-water to that land."

*Mason v. Shremsbury and Hereford Rail. Co. (q)* was the case of an artificial diversion of a natural watercourse, and was decided on the same principle. A natural watercourse, called Ashton Brook, flowing through the plaintiff's land, had been diverted for upwards of forty years by a canal company under the powers of their Act, and the bed had become silted up, and was no longer adequate to carry off the flood water in its natural state. The canal was discontinued and the waters restored to their former course, and the plaintiff's land was thereby flooded and damaged. The Court held that he had no legal ground of complaint. Blackburn, J.: "He had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state so far as it was a benefit, and was bound to submit to receive it so far as it was a nuisance." He held that the enjoyment de facto of the relief from the water for more than forty years did not give a legal right to the continuance of that relief, because no obligation was imposed

Right to have  
artificial  
diversion  
continued.



Right to have  
artificial  
diversion  
continued.

[on the canal company to continue to take the water; and that his enjoyment was not of right, but only so long as the particular purpose for which it was taken was served. Cockburn, C. J., gave judgment for the defendants, on the ground that the easement of the watercourse existed for the benefit of the dominant tenement alone, and could not operate to make a new right for the benefit of the servient tenement. Like any other easement, it might be discontinued if it became onerous or ceased to be beneficial to the party entitled (r).

Right of  
riparian  
owners on  
artificial  
diversion.

*Baily & Co. v. Clark, Son & Morland* (s) was another case in which rights in respect of an artificial diversion of a natural watercourse came into question, but in that case upon the question of the rights of riparian owners on the artificial channel. This channel was fed by a natural stream, and took its course from a spot in the natural stream to another spot at a distance of about a mile and a half, where it rejoined the river. The channel was admittedly artificial, and was dealt with on that footing; it was known to have existed for some centuries, but there was no evidence as to the time or surrounding circumstances of its origin. It was held that the rights of riparian owners upon its bank were the same as in the case of a natural stream, the proper inference in the circumstances being, that the artificial channel had been originally constructed upon those terms.

User by arti-  
ficial means.

In *Beeston v. Weate* (t) it was unsuccessfully attempted to extend the application of those cases to one where the flow of the water of a natural stream was, for more than the statutory period, enjoyed by means of artificial works, executed from time to time for the purpose of diverting the water through the servient on to the dominant tenement; and Lord Campbell pointed out in his judgment the distinction between the right to compel the continuance of a stream of artificial origin, and the right to have the benefit of a natural stream by proof of a user with the aid of artificial means.

Pollution.

It is laid down in the judgment in *Wood v. Waud* (u) that, although a riparian owner may have no right to compel the continuance of a stream of artificial origin, yet he has a right of action

(r) To the same effect are *McEroy v. Great Northern Railway*, [1900] 2 Ir. R. 325, and *Hanna v. Pollock*, [1900] 2 Ir. R. 664.

(s) [1902] 1 Ch. 649.

(t) (1856), 5 E. & B. 986.

(u) Above, p. 301. Cf. the reasoning in *Ballard v. Tomlinson* (1885), on appeal, L. R. 29 Ch. Div. 115; and *Young v. Bankier Distillery Co.*, [1893] A. C. 691.

[for pollution of the water of a stream, unless a right to pollute it has been acquired by user; in other words, that the right to send dirty water on to a man's land is not acquired unless the user has been to send dirty water.

But a further question, upon which considerable diversity of opinion prevails,—and it is equally applicable to natural and artificial watercourses,—is as to the right of a person having a mere permission to use the water of a stream to maintain an action for an injury caused to him in so using it. Licence to use water.

In *Whaley v. Laing* (x) the plaintiff, by permission of a canal company, made a communication from the canal to his own premises, by which water was brought on to them, with which water he fed his boilers; and the defendant fouled the water in the canal, whereby the water as it came into the plaintiff's premises was fouled, and by the use of it his boilers were injured. The defendant had no right or permission from the canal owners to do what he did. The Court of Exchequer gave judgment for the plaintiff, reading an averment in the declaration that the water "ought to flow without being fouled in the canal," as an assertion, not that the plaintiff had a right to the water there, but that the defendant had no right to foul it there; and holding that, as the defendant was the cause of dirty water flowing on to the plaintiff's premises without any right to do so, he was liable to an action. The Court expressly abstained from giving any opinion upon the question, whether an action would have been maintainable against the defendant if the defendant had diverted the water, or if the plaintiff had been obliged to go to the canal and fetch the water instead of its flowing into his premises. In the Exchequer Chamber the judgment was reversed, but reversed upon grounds involving no dissent from the judgment below, viz.:—that a man has no right to cause dirty water to flow on to his neighbour's land without some special right to do so; but the judgments in the Exchequer Chamber show that it was considered very doubtful whether a person, having a mere permission from a riparian owner to take water out of a stream, can maintain an action against a wrongdoer for diverting or fouling the stream higher up. *Whaley v. Laing.*

And it is now decided that no one but a riparian proprietor has a right to the water of a stream as against other riparian pro- *Stockport Waterworks Co. v. Potter.*

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(x) (1857), 2 H. & N. 476; (1858), 3 H. & N. 675, 901.

Licence to  
use water.

*Stockport  
Waterworks  
Co. v. Potter.*

[prietors (y). The Stockport Waterworks Company sued Potter for fouling the water of the river Mersey, coming to their works through a tunnel which they had made under a grant from a riparian proprietor. The Court of Exchequer held that they were not entitled to sue. The reason of the decision is given in the judgment of Pollock, C. B., and Channell, B. (in which Wilde, B., concurred). They say :—" It is difficult to perceive any possible legal foundation for a right to have the river kept pure in a person situate as this company is. There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant. It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is, that he can have them against the grantor (z), but not so as to sue other persons in his own name for the infringement of them. The case of *Hill v. Tupper* (a), recently decided in this court, is an authority for the proposition that a person cannot create by grant new rights of property, so as to give the grantee a right of suing in his own name for an interruption of the right by a third party."

Other cases.

The cases of *Crossley v. Lightowler* (b), *Wilts and Berks Navigation Co. v. Swindon Waterworks Co.* (c), *Ormerod v. Todmorden Mill Co.* (d), and *McCartney v. Londonderry and Lough Swilly Rail. Co., Ltd.* (e), are to the same effect; while *Nuttall v. Bracewell* (f), and *Holker v. Porritt* (g), where a natural stream had in effect been divided into two so as to create rights in both, are distinguishable.

(y) *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300.

(z) *Hamelin v. Bannerman*, [1895] A. C. 237.

(a) (1863), 2 H. & C. 121.

(b) (1867), L. R. 2 Ch. 478.

(c) (1874), L. R. 9 Ch. 451.

(d) (1883), L. R. 11 Q. B. D. 155.

(e) [1904] A. C. 301.

(f) (1866), L. R. 2 Exch. 1.

(g) (1875), L. R. 10 Exch. 59.

[And on the authority of *McCartney v. Londonderry and Lough Swilly Rail. Co., Ltd.* (h), it is submitted that a lower riparian owner, even though his flow of water was not diminished or injured in quality, provided that the facts were not such as to bring the case within the maxim *de minimis non curat lex*, could prevent a higher riparian owner from permitting a third person to use the stream. Such user would, it is submitted, be foreign to or unconnected with the tenement of the higher riparian owner, and the permission given would therefore be in excess of the rights of such owner (i).]

Permission to  
third party to  
use stream  
unauthorized.

(h) [1904] A. C. 301.

(i) *Kensit v. Great Eastern Rail. Co.* (1884), L. R. 27 Ch. Div. 122, might appear to be inconsistent with this pro-

position, but see the comments of Lord Lindley on that case in *McCartney v. Londonderry and Lough Swilly Rail. Co., Ltd.*, *ubi sup.*, at p. 313.

## CHAPTER II.

## RIGHTS TO LIGHT AND AIR.

Lateral passage of light not of common right.

THE right to flowing water in a natural stream, it has already been shown, is an ordinary right of property requiring no length of time to fortify it. The right to light and air seems to depend, however, upon very different grounds. The passage of light and air over lands unincumbered by buildings must necessarily have existed from time immemorial: but the use of the light and air so passing, by means of windows in a house or otherwise, confers no right unless it has been continued during twenty years. The natural rights of the owner of property in this respect seem to be defined by the legal maxim, "Cujus est solum ejus est usque ad cœlum et ad inferos" (a); and the passage of these elements over adjoining lands affords per se no evidence of the enlargement of such right by an easement.

Easement may be acquired.

The right to the reception of light and air in a lateral direction [without obstruction] is an easement. The strict right of property entitles the owner to so much light and air only as fall perpendicularly on his land. He may build to the very extremity of his own land, and no action can be maintained against him for disturbing his neighbour's privacy, by opening windows which overlook the adjoining property (b). But it is competent to such neighbour to obstruct the windows so opened by building against them on his own land, at any time during twenty years after their construction, and thus prevent the acquisition of the easement (c); if, however, that period is once suffered to elapse, his

(a) [To place things projecting into the air over another's land is actionable: see *Pickering v. Rudd* (1815), 4 Camp. 219; 16 R. R. 777; *Fay v. Prentiss* (1845), 1 C. B. 828; 68 R. R. 823; *Martyr v. Lawrence* (1864), 2 De G. J. & S. 261. But, where one of two adjoining houses is built so as to protrude into or over the other, the protrusion may, by grant, reservation, or otherwise, be as of right: see *Corbett v. Hill* (1870),

L. R. 9 Eq. 671; *Francis v. Haycard* (1882), L. R. 22 Ch. Div. 177; *Lagbour v. Gridley*, [1892] 2 Ch. 53. This is continually done at the present day in the case of buildings with cornices returned at the ends so as to project over the perpendicular boundary line of the next building.]

(b) *Chandler v. Thompson* (1811), 3 Camp. 81; 13 R. R. 766.

(c) See per Littledale, J., in *Moore v.*

long acquiescence becomes evidence, as in the case of other easements, of a title, by the assent of the party whose land is subject to it (d).

Easement  
may be  
acquired.

In *Penwarden v. Ching* (e), to an action of trespass for breaking and entering plaintiff's close and breaking down boards, the defendant justified, because "the boards were obstructing an ancient window of the defendant, through which light and air at all times of right ought to pass, and that defendant entered and removed the same." The plaintiff replied, "that the light and air ought not to enter in manner and form," &c. It appeared that the window was made in 1807, "under circumstances from which, connected with the subsequent use of it, the jury might presume a grant." It was contended for the plaintiff, that the plea could not be sustained, as the window was shown not to be an ancient window. Tindal, C. J.: "The question is, not whether the window is what is strictly called ancient, but whether it is such as the law in indulgence to rights has in modern times so called, and to which the defendant has a right; for this is the substance of the plea."

*Penwarden v.  
Ching.*

[The mode in which an easement may be acquired, namely by grant, express or implied, or by prescription, has been fully considered in the second part of this work; but certain questions, peculiar to the easement of light, should be referred to in this place.

Acquisition  
of easement.

*Rawson* (1824), 3 B. & C. 340; 27 R. R. 375; [and, as showing that a railway company has in this respect the same rights as an individual, *Bonner v. Great Western Railway* (1883), L. R. 24 Ch. Div. 1; *Poster v. London, Chatham, and Dover Railway*, [1895] 1 Q. B. 711.]

(d) [Some expressions are to be found in the books implying doubts as to the appropriateness of the term easement in this case, and of the soundness of the theory that the origin of the right to light at the common law was either an implied covenant or grant. There appears to be no ground for such doubts. The implied grant is not of the light, but of the right to the negative servitude, binding the owner of the adjoining land not to build on it: or, as was said by Creswell, J., 7 C. B. 566, "the land becomes subject to a right analogous to what, in the Roman law, was called a servitude," i.e., a servitude "ne facias;" and the easement so created affects the adjoining land by burthening it with a negative servitude. "ne facias." Fur-

ther, a number of authorities appear to treat the right as originating in covenant or grant; but the point has become of little importance, as, under the 2 & 3 Will. 4, c. 71, s. 3, twenty years' actual enjoyment of light without interruption confers an absolute right, unless the enjoyment has been had under a written consent or agreement given for the purpose; and most cases fall within the statute. See per Lord Mansfield in *Darwin v. Upton* (1786), 2 Wms. Saund. 175 c, 2 Notes to Saund. 506; Little-dale, J., in *Moore v. Rawson* (1824), 3 B. & C. 340; 27 R. R. 475; Parke, B., in *Harbidge v. Warwick* (1849), 3 Exch. 556; 77 R. R. 725; Watson, B., in *Rowbotham v. Wilson* (1857), 8 E. & B. 143; Brett, L. J., in *Angus v. Dalton* (1878), L. R. 4 Q. B. Div. at p. 196; Fry, J., in *Dalton v. Angus* (1881), L. R. 6 App. Cas. at p. 771; and Bowen and Fry, L. JJ., in *Scott v. Pape* (1886), L. R. 31 Ch. Div. at pp. 570, 575.]

(e) (1829), Moo. & Mal. 400.

Some aperture required.

[In the first place, it is clear that, in order to the acquisition of an easement of light by enjoyment, there must be some window or other aperture to measure or define the enjoyment; and the right to light cannot be acquired by user in respect of a vacant piece of ground.]

*Roberts v. Macord.*

In *Roberts v. Macord* (*f*), the defendant in justification of a trespass for breaking down a wall, pleaded that the wall obstructed the passage of light and air to his timber-yard and saw-pit, to which he was lawfully entitled for drying the timber, and the more convenient use and occupation of the timber-yard and saw-pit. Patteson, J., said, "The plea was a very novel one, and one which, in his opinion, could not be supported in point of law. If such a plea could be sustained, it would follow that a man might acquire an exclusive right to the light and air, not only as heretofore, by having been suffered to build on the edge of his property, and suffered for a certain space of time to enjoy that building without interruption, but merely by reason of having been in the habit of laying a few boards on his ground to dry; such a rule would be very inconvenient, and very unjust: still the question, in the present stage of the proceedings, was, was the plea proved in point of fact? Upon that point he did not think the mere circumstance of the defendant's having had a saw-pit upon the premises, and laid his timber there during twenty years, would, in a case like this, be sufficient to raise the presumption of a grant. The jury must look to all the circumstances of the case, not forgetting the manner in which the defendant himself had occupied the premises. The questions for the jury were—whether the defendant had, in fact, used the saw-pit and timber-yard for twenty years; and whether, during that time, the light and air had been really necessary for the purpose stated in the defendant's plea: if both these facts were made out to the satisfaction of the jury, they would find for the defendant; otherwise, for the plaintiff." The jury found for the plaintiff. No attempt was made to impeach this ruling of the learned judge by any motion for a new trial; and, indeed, the questions left by him to the jury appear to be [in any case] perfectly unobjectionable as far as the defendant was concerned; although, had the two questions been determined in favour of the defendant, it would appear that the plaintiff might have contended that a further point must have been found for the

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(*f*) (1832), 1 Moo. & Rob. 230; 42 B. R. 784.

defendant; that his enjoyment was of such a nature as indicated to the plaintiff that such an easement was claimed against him; or, in other words, that it was not vitiated by being *clam*.

Some aperture required.

*Roberts v. Macord.*

The case is no[t a direct] authority for the general position deduced from it by the reporters in their marginal note, that "The use of an open space of ground, in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land, so as to obstruct the light and air." Had the jury found the two questions left to them by the learned judge in favour of the defendant, and that he had, openly as well as in fact, used the timber yard for twenty years, and, notwithstanding such finding, the Court above had decided that judgment must be entered for the plaintiff non obstante veredicto, the marginal note of the reporters would have been warranted by the case itself. [But nevertheless the law laid down in the head-note appears to be sound (*g*). And, under the Prescription Act, the enjoyment must have been had with a "dwelling house, workshop, or other building;" so that the point could not arise under the Act.

But no actual enjoyment (in the sense of user and occupation) of the light need be shown; it is sufficient that the aperture existed, and that the light might have been used at any time (*h*).

No user need be shown.

Considerable doubt has existed as to the extent of the right acquired by enjoyment, whether the access of light through a window for the statutory period entitles the owner to object to *any* substantial diminution of the light which has been accustomed to pass through the window, or whether the adjoining owner may build so as to substantially diminish the light provided that no actual nuisance is created. After a long controversy the question is now settled in the latter sense (*i*), but some mention of the earlier authorities appears to be desirable.

Extent of right acquired.

In *Aldred's Case* (*k*), an action on the case for building a pig-stye and obstructing lights, it was resolved that the action was

*Aldred's Case.*

(*g*) See, e.g., *Potts v. Smith* (1866), L. R. 6 Eq. at p. 318, per Malins, V.-C.; *Garritt v. Sharpe* (1835), 3 A. & E. 325; *Scott v. Pape* (1886), L. R. 31 Ch. Div. 554; per Bowen, L. J., 571, ad fin.; *Harris v. De Pinna* (1886), L. R. 33 Ch. Div. 238. A skylight is sufficient: *Harris v. Kinloch*, W. N. (1895), p. 60.  
(*h*) *Courtauld v. Legh* (1869), L. R. 4 Exch. 126 (a case of an unfinished house); *Cooper v. Straker* (1888), L. R.

40 Ch. D. 21 (window with iron shutters only opened occasionally); *Collis v. Laughier*, [1894] 6 Ch. 659 (window spaces opened, but no window sashes put in); *Smith v. Baxter*, [1900] 2 Ch. 138 (windows obscured by shelving).

(*i*) *Collis v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179. As to what amounts to a nuisance, see post, p. 452.

(*k*) (1611), 9 Rep. 58 B.



Extent of  
right  
acquired.

[well maintainable, "for in a house four things are desired, *habitatio hominis, delectatio inhabitantis, necessitas luminis et salubritas aeris*, and for nuisance done to three of them an action lies, *sc.* (1) 'to the habitation of a man, for that is the principal end of a house, (2) for hindrance of the light, for the ancient form of an action on the case was significant, *sc., quod messuagium horrida tenebritate obscuratum fuit*," &c.

*Fishmongers'*  
*Co. v. East*  
*India Co.*

In *Fishmongers' Co. v. East India Co.* (1), on an application for an injunction to restrain building so as to stop up lights, Lord Hardwicke said: "And as to the question of whether the plaintiffs' messuage is an ancient building so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here; for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. . . . But I am of opinion it is not a nuisance contrary to law; for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city; and here will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground. Therefore, take nothing by the motion."

*Cotterell v.*  
*Griffiths.*

In *Cotterell v. Griffiths* (m), an action for obstructing lights, Lord Kenyon said, "That the plaintiff was clearly entitled to recover: that to sustain this action a total privation of the light was not necessary; anything which tended to deprive a person of the enjoyment of the light and air in the same quantity to which his house was entitled as an ancient messuage, entitled him to an action: that here it was admitted that since the erection of the nuisance complained of he had not the same quantity of light as before while the blinds remained, and that that was such a privation as entitled him to recover in the action." The dicta in this case appear to go too far.

*Att.-Gen. v.*  
*Nichol.*

In *Attorney-General v. Nichol* (n), on a motion to dissolve an injunction in Chancery, Lord Eldon said, "I repeat the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground (for an injunction); and there is as little doubt that this Court will not interpose upon every degree of

(1) (1752), 1 Dickens, 163.

(m) (1801), 4 Esp. 69.

(n) (1809), 16 Ves. 338; 10 R. R. 186.

Extent of  
right  
acquired.

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[darkening ancient light and windows. There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case; which, however, might be maintained in many cases which would not support an injunction. The affidavits, therefore, stating only that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do.”

In *Back v. Stacey* (o), Best, C. J., directed the jury that “it was not sufficient to constitute an illegal obstruction that the plaintiff had in fact less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all the purposes for which it might otherwise have been applied. In order to give a right of action and sustain the issue there must be a substantial deprivation of light, sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done. His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises.”

In *Parker v. Smith* (p), Tindal, C. J., in summing up, said: “The question in this case is, whether the plaintiff has the same enjoyment now which he used to have before of light and air in the occupation of his house; whether the alteration, by carrying forward the wall to the height of ten feet, has or has not occasioned the injury which he complains of. It is not every possible, every speculative, exclusion of light which is the ground of an action; but that which the law recognises is, such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears that the defendants’ premises had been injured by fire, and they re-erected them in a different manner. They have the right to re-erect in any way they please, with this single limitation, that the alteration which they make must not diminish the enjoyment by the plaintiff of light and air. It is contended by the defendants that, on the whole, the light and air are increased. If, as matters now stand, upon the evidence you have heard, you think that this is a true proposition,

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(o) (1826), 2 C. & P. 466; 31 R. R. 679. (p) (1832), 5 C. & P. 438; 38 R. R. 828.

Extent of  
right  
acquired.

[then the plaintiff will have no ground of action. But if, on the contrary, you think that in effect these alterations (though they may certainly be improvements) on the whole diminish the quantity of light and air, then you will find for the plaintiff for nominal damages; and your verdict will have no other effect than that of a notice to the defendants, that they must pull down the building of which the plaintiff complains.”

*Pringle v.  
Wernham.*

In *Pringle v. Wernham* (q), Lord Denman, C. J., in summing up, said: “Everyone is entitled to enjoy that portion of light which he has enjoyed through the windows of his dwelling-house for a long period of time. The first question is, whether, in consequence of this building of the defendant’s, the plaintiff has less light than before to so considerable a degree as to injure the plaintiff’s property in point of value. To sustain this action there must have been a considerable obstruction of light, and the merely taking off a ray or two will not be sufficient.”

*Wells v. Ody.*

In *Wells v. Ody* (r), Parke, B., adopted the law as laid down by Tindal, C. J., in *Parker v. Smith*, but left to the jury the question whether the effect of the defendant’s building was to diminish the light and air so as sensibly to affect the occupation of the plaintiff’s premises and make them less fit for occupation.

Reviewing the authorities down to this point, it is noticeable that, while in most of the earlier cases the question raised is whether the effect of the building is to create a nuisance or not, in the cases from *Parker v. Smith* downwards more stress is laid on the diminution of the light formerly enjoyed by the dominant owner.

*Jackson v.  
Duke of  
Newcastle.*

The next case of importance occurred twenty-eight years later. In *Jackson v. Duke of Newcastle* (s), the plaintiff moved for an injunction to restrain the erection of a building which would obscure an ancient light. The window in question admitted light to a small room which was used as the counting-house of a grocer’s shop; and it appeared that the contemplated building, though it would diminish the amount of light coming through the window, and so render the room less fit for other purposes, requiring more light, to which it might thereafter be put, yet would leave sufficient light for the uses to which the room was actually applied.

(q) (1836), 7 C. & P. 377.

(r) (1836), 7 C. & P. 410; 46 R. R. 358; Preface V.

(s) (1864), 3 D. J. & S. 275; 10 Jur. N. S. 680, 810; 33 L. J. Ch. 698.

[Romilly, M. R., granted an injunction; but on appeal Lord Westbury was of opinion that, as no present loss of comfort or convenience was shown and the injury complained of was merely speculative, the remedy by action for damages was sufficient, and dissolved the injunction. This case turned rather upon the choice of the remedy than upon the extent of the right in dispute, and is therefore not of much value as an authority on the question now under discussion.

Extent of  
right  
acquired.

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But in *Clarke v. Clark* (t) the question again received consideration, and Lord Cranworth, C., delivered a judgment which has been often followed and approved. In that case the defendant had erected a building which undoubtedly diminished the amount of lateral light coming to the plaintiff's ancient window, and rendered the plaintiff's room less cheerful, especially during the winter months; but Lord Cranworth refused the injunction, saying that there was not such an obstruction of light as to amount to a nuisance. "The window in question (he said) still receives greatly more light than falls to the lot of inhabitants of towns generally. . . . What the plaintiff was bound to show was, that the buildings of the defendant caused such an obstruction to light as to interfere with the ordinary occupations of life. . . . The real question is not what is, scientifically estimated, the amount of light intercepted, but whether the light is so obstructed as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life."

*Clarke v.  
Clark.*

In *Yates v. Jack* (u) Lord Cranworth, holding that the defendant's new buildings would materially interfere with the quantity of light necessary or desirable for the plaintiffs in the conduct of their business, granted an injunction restraining the defendant from erecting any building so as to darken, injure, or obstruct any of the ancient lights of the plaintiffs as the same were enjoyed previously to the taking down by the defendant of his buildings on the opposite side of the street, and also from permitting to remain any buildings already erected which would cause any such obstruction. The judgment in this case indicates no intention on Lord Cranworth's part to depart from the rule laid down by him in *Clarke v. Clark*; but the effect of the order (as set out above) was to preserve to the plaintiffs the whole of the light previously enjoyed

*Yates v. Jack.*

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(t) (1866), L. R. 1 Ch. 16.

(u) (1866), L. R. 1 Ch. 295.

Extent of  
right  
acquired.

[by them, without any express reference to the question whether it could be diminished without causing a nuisance.

The form of the order in *Yates v. Jack*, which was in use for many years after that decision, and probably contributed to the uncertainty which existed as to the nature of the dominant owner's rights (v), was in this respect modified in *Colls' Case* (w).

*Durell v. Pritchard.*  
*The Curriers' Co. v. Corbett.*  
*Robson v. Whittingham.*  
*Kelk v. Pearson.*

In *Durell v. Pritchard* (x), *The Curriers' Company v. Corbett* (y), and *Robson v. Whittingham* (z), Knight Bruce and Turner, L.JJ., followed *Clarke v. Clark*, in each case refusing to grant an injunction on the ground that no material damage had been shown.

In *Kelk v. Pearson* (a) an injunction was granted on similar grounds, and the principle was clearly stated by James, L. J. "On the part of the plaintiff," he says, "it was argued before us that this was an absolute right—that now, under the statute 3 & 4 Will. 4, c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house. . . . Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before the statute was to have that amount of light for a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it was a dwelling-house, or for the beneficial use and occupation of the house if it was a warehouse or a shop or other place of business. That was the extent of the easement, to prevent your neighbour from building on his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable"; and he says that the absolute and indefeasible right given by the statute is not greater. Mellish, L. J., laid down the rule in different terms; but it does not appear that he intended to differ from the above observations of James, L. J. (b).

*City of London Brewery Co. v. Tennant.*

In *City of London Brewery Co. v. Tennant* (c) the same rule was repeated and applied, and an injunction was refused, Lord Selborne being a party to the decision (d).

(v) See, e.g., the judgments in *Dent v. Auction Mart Co.* (1866), L. R. 2 Eq. 236; *Martin v. Hendon* (1866), *ibid.* 425; and *Calcraft v. Thompson* (1867), 15 W. R. 367, which cannot now be altogether relied upon as good law.

(w) See per Lord Macnaghten, [1904] A. C. at p. 193.

(x) (1866), L. R. 1 Ch. 244.

(y) (1865), 13 W. R. 1056.

(z) (1866), L. R. 1 Ch. 442.

(a) (1871), L. R. 6 Ch. 809.

(b) See per Lord Davey in *Colls' Case*, [1904] A. C. at p. 200.

(c) (1873), L. R. 9 Ch. 212.

(d) Cf. *Leach v. Schweder* (1874), L. R. 9 Ch. 463, a case of grant.

[The judgments in *Clarke v. Clark*, *Kelk v. Pearson*, and *City of London Brewery Co. v. Tennant*, clearly laid down the rule that the Court will not interfere to protect ancient lights unless there is such an obstruction of the light as to interfere with the comfortable use and enjoyment of the building according to the ordinary notions of mankind; in other words, unless a nuisance is caused (*e*).

Extent of  
right  
acquired.

Result of  
authorities.

But the impression, derived from *Parker v. Smith* and some of the succeeding cases, that the dominant owner was entitled to the whole of the light which had been accustomed to pass through his windows during the statutory period, was not finally removed even by these decisions. In *Scott v. Pape* (*f*) the repudiated doctrine

Some doubtful  
decisions.

*Scott v. Pape.*

re-appeared in its most extreme form. In that case Cotton, L. J., said: "After twenty years the person who owns a dwelling-house, if he has used and enjoyed light, gets the absolute right to what he has used and enjoyed; and in my opinion the quantum of his enjoyment is defined by, and must depend on, the area of his windows, and also on the distance they are from other buildings. He acquires, in consequence of the position of other buildings and the size of the window, a right under this section (sect. 3 of the Prescription Act) to the enjoyment of that particular light which has come to his building. The 'access and use of light' depends upon the number of pencils of light which come directly or by refraction into that window." Bowen, L. J., was even more emphatic: "Coming to the language of the section (he said), what does it do? It seems to me that it creates an indefeasible right to the access of a specific quantity of light for the use of the house, workshop or building." And in *Warren v. Brown* (*g*), the Court of Appeal, adopting a similar view, reversed a considered judgment of Wright, J. (*h*), and granted an injunction, notwithstanding that abundant light was left for purposes of ordinary habitation and business. "If," said Romer, L. J., in delivering the judgment of the Court, "ancient lights are interfered with substantially and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief. With regard to the exact point arising in this case we think that, since the case of *Kelk v. Pearson* (*i*), it is impossible to hold that the statutory right is not interfered with merely because after the interference the house may still come up

*Warren v. Brown.*

(*e*) Cf. *Ecclesiastical Commrs. for England v. Kino* (1880), L. R. 14 Ch. Div. 213.

(*f*) (1886), L. R. 31 Ch. Div. 554.

(*g*) [1902] 1 K. B. 16.

(*h*) [1900] 2 Q. B. 722.

(*i*) Above, p. 322.

Extent of  
right  
acquired.

*Colls v. Home  
and Colonial  
Stores.*

[to some supposed standard as to what a house ordinarily requires by way of light for the purposes of inhabitancy or business.”

But in *Colls v. Home and Colonial Stores* (j) the question was again raised, and on this occasion carried to the ultimate Court of Appeal. In that case Joyce, J., before whom the action was tried, held that, if the plaintiffs were entitled to the full amount of light then enjoyed without appreciable diminution, they would have a good cause of action upon the erection of the defendant's building; but he found as a fact that the plaintiffs' premises would, even after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business; and following the decision of Wright, J., in *Warren v. Brown* (which had not then been reversed), he dismissed the action. On appeal, the Court of Appeal, following their own decision in *Warren v. Brown*, reversed the decision of Joyce, J., and granted an injunction.

On appeal to the House of Lords, the decision of the Court of Appeal was reversed, and the judgment of Joyce, J., restored; and *Warren v. Brown* was overruled. “The question,” said Lord Halsbury, C., “may be very simply stated thus: after an enjoyment of light for twenty years, or if the question arose before the Act for such a period as would justify the presumption of a lost grant, would the owner of a tenement in respect of which such enjoyment had been possessed be entitled to *all* the light without any diminution whatsoever at the end of such a period? My lords, if that were the law, it would be very far-reaching in its consequences, and the application of it to its strict logical conclusion would render it almost impossible for towns to grow, and would formidably restrict the rights of people to utilise their own land. Strictly applied, it would undoubtedly prevent many buildings which have hitherto been admitted to be too far removed from others to be actionable; but if the broad proposition which underlies the judgment of the Court of Appeal be true, it is not a question of forty-five degrees, but any appreciable diminution of light which has been enjoyed (that is to say, has existed uninterruptedly for twenty years) constitutes a right of action, and gives a right to the proprietor of a tenement that has had this enjoyment to prevent his neighbour building on his own land. My lords, I do not think this is the law. The argument seems to me to rest upon a false analogy, as though the access to and enjoyment of light

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(j) [1902] 1 Ch. 302; [1904] A. C. 179.

[constituted a sort of proprietary right in the light itself. Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none. If the same proposition against which I am protesting could be maintained in respect of air, the progressive building of any town would be impossible. The access of air is undoubtedly interfered with by the buildings which are being built every day round London. The difference between the town and country is very appreciable to the dweller in cities when he goes to the open country, or to the top of a mountain, or even a small hill in the country; but would the possessor for twenty years of a house on the edge of a town be at liberty to restrain his neighbour from building near him because he had enjoyed the free access of air without buildings near him for twenty years? No doubt this is an extreme case, but it is one of the extreme cases which tries the principle. The truth is that, though there were objections to ask a jury whether the enjoyment *talis qualis* was such that they might presume a lost grant when nobody supposed that such a grant was ever really made, yet it gave the opportunity of considering what was the extent of the supposed grant, and, if anything so extreme as I have just supposed were claimed, no jurymen in their senses would have affirmed such a grant. The statute upon which reliance is placed in this case illustrates the danger of attempting to put a principle of law into the iron framework of a statute. The statute, literally construed by the use of the words '*the light*,' would mean all the light which for twenty years has existed in the surroundings of the tenement which has enjoyed it; yet, singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof; but, though I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think the language of the statute has led to some of the decisions which your lordships are now called upon to review. Certainly, in the older decisions which have been brought to your lordships' notice in Mr. Bray's very able argument, the proposition which, as I have said, underlies the judgment now under appeal finds no place. Lord Hardwicke, long ago in 1752—*Fishmongers' Co. v. East India Co.* (k)—dealing with this

Extent of  
right  
acquired.

*Colls v. Home  
and Colonial  
Stores.*

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(k) 1 Dick. 163.



Extent of  
right  
acquired.

*Colls v. Home  
and Colonial  
Stores.*

[very question, the alleged obstruction to light, laid down what I believe to be law to-day. 'It is not sufficient,' he said, 'to say that it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city, and here there will be seventeen feet distance, and the law says it must be so near as to be a nuisance.' Lord Cranworth, in *Clarke v. Clark* <sup>(1)</sup>, adopted the same test, and his observation, though a subsequent decision of his seemed to throw doubt upon it, has received the assent of some of the most learned judges who ever sat upon the English Bench. I think that the whole subject has been confused by certain decisions which were dependent on the facts proved, and were incautiously reported as laying down principles of law, when they were, in my view, only intended to be findings of fact in the particular case. At all events, I am prepared to hold that the test given by Lord Hardwicke is the true one. . . . The test of the right is, I think, whether the obstruction complained of is a nuisance, and as it appears to me the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as on the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise, as if he lived in the country and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action; but in each of such cases, it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action."

The other lords concurred, founding their judgments principally on *Clarke v. Clark*, *Kelk v. Pearson*, and *City of London Brewery Co. v. Tennant*, of which they entirely approved. Lord Macnaghten said that the qualification suggested by Bowen, L. J., in *Scott v. Pape* <sup>(m)</sup> was not well founded. Lord Davey referred to the supposed inconsistency between Lord Cranworth's two judgments in *Clarke v. Clark* and *Yates v. Jack*, and said that the language used by Lord Cranworth in the latter case was directed to the argument with which he was dealing. Lord Lindley pointed out that in *Yates v. Jack* the plaintiff's right to light was

(1) (1866), L. R. 1 Ch. 16.

(m) Above, p. 323.

[clearly infringed, whether the measure of the light to which he was entitled was all that had come through his windows, or only so much as was reasonably necessary for business purposes. "The decision in *Kelk v. Pearson* (he said) has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will lie for an obstruction to that light unless the obstruction amounts to a nuisance. But in considering what is an actionable nuisance, regard is had, not to special circumstances which cause something to be an annoyance to a particular person, but to the habits and requirements of ordinary people, and it is by no means to be taken for granted that a person who wants an extraordinary amount of light for a particular business can maintain an action for a diminution of light if only his special requirements are interfered with. Some important decisions will be found as to nuisances to persons carrying on delicate trades or requiring more comfort or freedom from annoyance than ordinary people in the cases of *Walter v. Selfe* (n), *Crump v. Lambert* (o), and *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.* (p); and as to the character of the neighbourhood, see *St. Helen's Smelting Co. v. Tipping* (q)."

Extent of  
right  
acquired.

*Colls v. Home  
and Colonial  
Stores.*

The test laid down in *Colls' Case* had to be applied in *Kine v. Kine v. Jolly*. *Jolly* (r). In that case Kekewich, J., before whom the action was tried, granted an injunction. In giving judgment his lordship said: "The great cause of complaint has been of the obstruction to light to what has been called the morning room. . . . That there has been a large obstruction of light by the erection of the defendant's house is abundantly clear, and I think it is also clear that there has been a large interference with the cheerfulness of the room. . . . I am convinced that the character of the room is altered, and that though still a well-lighted room it has lost in the obstruction of light one of its chief charms and advantages. . . . Having given all the circumstances full consideration, I have come to the conclusion that the obstruction to the light of the morning room is a nuisance within the meaning of the authorities on that subject."

This decision was confirmed by a majority of the Court of Appeal; and an appeal to the House of Lords also failed, the

(n) (1851), 4 De G. & Sm. 322; 87 R. R. 393.

(o) (1867), L. R. 3 Eq. 409.

(p) [1902] A. C. 393.

(q) (1865), 11 H. L. C. 642. Cf. *Rushmer v. Polsue and Alfieri, Ltd.*, [1907]

A. C. 121.

(r) [1905] 1 Ch. 480; [1907] A. C. 1.

Extent of  
right  
acquired.

[House being equally divided in opinion. Difficulty was caused by the learned judge's finding that the room was "still a well-lighted room"; but Lord Loreburn, C., interpreted this as meaning that it was well lighted, not according to the standard to be expected in the actual locality and surroundings, but according to the standard of a crowded city. It seems clear that the decision stood by reason of the express finding that there was a nuisance.

*Higgins v.  
Betts.*

The effect of the authorities, including *Colls' Case*, was stated by Farwell, J., in *Higgins v. Betts* (s), as follows: "Apart from express contract or grant, the owner of a house has no right to any access of light to the windows thereof over his neighbour's land until he has acquired it by prescription or under the Act. When he has so acquired it he has a house with an easement of light attached to it. Any substantial interference with his comfortable use and enjoyment of his house according to the usages of ordinary persons in that locality is actionable as a nuisance at common law. His neighbour's brick burning or fried fish shop may be a nuisance in respect of smell, his pestle and mortar in respect of noise; and in like manner his neighbour's new building may be a nuisance in respect of interference with light. The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement in addition to the right of property before it can be enforced, the two latter are ab initio incident to the right of property. But the wrong done is in both cases the same, viz.:—the disturbance of the owner in his enjoyment of his house. Inasmuch as the acquisition of the easement was a necessary condition precedent to the right to sue, the Courts appear in many cases to have addressed themselves rather to the extent of the easement acquired and the amount of such easement taken away by the defendant, than to the sufficiency for ordinary purposes of the amount of light left, so much so that many expressions can be found that lend support to the argument that the right to light was a right of property for which trespass would lie. The dominant owner was never entitled either by prescription or under the Act to all the light that came through his windows. It was not enough to show that some light had been taken, but the question always was whether so much had been taken as to cause a nuisance. But for many years the tendency of the Courts had been to measure the nuisance by the amount taken from

(s) [1905] 2 Ch. 210.

[the light acquired, and not to consider whether the amount left was sufficient for the reasonable comfort of the house according to ordinary requirement. If a man had a house with unusually excellent lights, it was treated as a nuisance if he was deprived of a substantial part of it, even although a fair amount for ordinary purposes was left. It is in this respect that *Colls' Case* has to my mind readjusted the law. It is still, as it always has been, a question of nuisance or no nuisance, but the test of nuisance is not 'how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had?' but 'how much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind?' . . . This puts the case of nuisance by interference with light on the same footing as other cases of nuisance, e.g., noise: for, apart from the question of locality, which is always important in considering the question of nuisance or no nuisance, the fact that the owner of a house had enjoyed an exceptional quiet gave him no right to more than the ordinary freedom from extraordinary noises."

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*Higgins v.  
Betts.*

In this case the injunction was granted in the *Yates v. Jack* form, with the addition of the words "so as to be a nuisance," suggested by Lord Macnaghten in *Colls' Case*.

Some of the judges have been inclined, in dealing with the easement of light, to establish a rule or test more specific than the above.

Angle of  
forty-five  
degrees.

The Metropolis Management Amendment Act, 1862 (*t*), passed on the 7th of August, 1862, contained the following provision:—

"No building, except a church or chapel, shall be erected, on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works, nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance without such consent; and, in determining the height of such building, the measurement shall be taken from the level of the centre of

(*t*) 25 & 26 Vict. c. 102, s. 85: repealed by the London Building Act, 1894, and re-enacted (with modifica-

tions) by sect. 49 of that Act. Cf. the bye-law of the Metropolitan Board, given in L. R. 2 Ch. D. 168, n.

Extent of  
right  
acquired.

[the street immediately opposite the building up to the parapet or eaves of such building.]”

Angle of  
forty-five  
degrees.

It would appear, both from the character of the statute in which the above provision is contained, and also from the direction to measure the distance in every case, not from the sill of any window, but from the level of the street, that the clause was primarily intended, not to protect the enjoyment of light in private houses, but to ensure the free passage of air and sunlight to the streets themselves. But in some cases decided within a few years of the passing of the statute, such as *Hackett v. Baiss* (u), the rule was understood otherwise.

The subsequent cases were, however, less favourable to the establishment of any rule or test founded on the analogy of the statute.

*Theed v.  
Debenham.*

In *Theed v. Debenham* (x), where the plaintiff, a sculptor, claimed and had enjoyed a large quantity of light to the window of his studio, Bacon, V.-C., who granted an injunction, declined to recognize any such rule as that contended for, and treated *Hackett v. Baiss* as resting on its special circumstances. “The regulation may be an illustration or guide, but rule there is none.”

*Ecclesiastical  
Commissioners  
v. Kino.*

In *Ecclesiastical Commissioners v. Kino* (y), the Court of Appeal also declined to apply any such rule. “The fact,” said James, L. J., “that forty-five degrees of light are left is only a small element in the case. It may be used as a sort of test in the absence of any other mode of arriving at a conclusion; but there is no rule of law, no rule of evidence, and no presumption except of the very slightest kind, that, where the angular height of an erection is less than forty-five degrees, the access of light is not substantially interfered with.” Brett, L. J., said that the proper direction to give to a jury was that which was laid down by Lord Chief Justice Best in *Back v. Stacey* (z); and Cotton, L. J., gave judgment on the point as follows: “I think that the way in which the provision as to forty-five degrees has been dealt with by judges in the Chancery Division is unfortunate, the Metropolitan Buildings Act having been loosely referred to without looking at the clause. That clause is intended to deal with the width of streets, and is not intended to lay down any rule applicable to the

(u) (1875), L. R. 20 Eq. 494. See also *Beadel v. Perry* (1866), L. R. 3 Eq. 465; *City of London Brewery Co. v. Tennant* (1873), L. R. 9 Ch. 212.

(x) (1876), L. R. 2 Ch. D. 165.

(y) (1880), L. R. 14 Ch. Div. 213.

(z) Above, p. 319.

[light which a man is entitled to enjoy in the City of London. The angle of forty-five degrees is not taken from the windows, but from the top of one house to the level of the street on the other side; and, therefore, to derive from that enactment any rule to guide us in saying whether or no there has been a substantial interference with the use and enjoyment of the building as regards light, is, in my opinion, looking to a rule laid down for one purpose as a guide in an entirely different matter. When the buildings do not rise above the prescribed angle, there will probably, under ordinary circumstances, be no substantial interference with the enjoyment of light; but that is not a rule to guide a jury or the Court in coming to a conclusion as to whether there is a substantial interference; it is only a circumstance which will very often be a sufficient guide, but which in the circumstances of the present case appears to me to furnish no guide at all.]

Extent of  
right  
acquired.

Angle of  
forty-five  
degrees.

*Eccel. Commrs.  
v. Kino.*

In *Parker v. First Avenue Hotel Co. (a)*, North, J., apparently following *Hackett v. Baiss*, had granted an injunction restraining the defendants from raising their new buildings in front of the plaintiff's ancient windows to a greater height than three feet above the sill of those windows, with a proviso that the injunction should not "prevent the defendants from putting on a sloping roof of greater height so long as the angle of incidence of light over such sloping roof to the centre part of the plaintiff's said windows be not less than forty-five degrees from the perpendicular above the point of incidence." On appeal by the plaintiff, it was decided by the Court of Appeal that he was entitled to a judgment in general terms and without any reference to the angle of incidence,—no evidence having been given to show that a roof of the kind referred to would not in the particular case obstruct the light claimed.

*Parker v.  
First Avenue  
Hotel Co.*

And the question has now been set at rest by the decision in *Colls v. Home and Colonial Stores, Ltd. (b)*, where it was laid down that there is no hard and fast rule with regard to the angle of forty-five degrees.

*Colls v. Home  
and Colonial  
Stores, Ltd.*

"There is no rule of law," said Lord Lindley (c), "that if a person has forty-five degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that

(a) (1883), L. R. 24 Ch. D. 282.

(c) *Ibid.* at p. 210.

(b) [1904] A. C. 179.

Extent of  
right  
acquired.

[window: *Theed v. Debenham* (d). But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of forty-five degrees is left to him, especially if there is good light from other directions as well. The late Lord Justice Cotton pointed this out in *Ecclesiastical Commissioners v. Kino* (e). See also *Parker v. First Avenue Hotel Co.* (f)."]

Extraordi-  
nary user.

A question has from time to time arisen as to whether the owner of a tenement who for upwards of twenty years has carried on there a business requiring an extraordinary amount of light, and has in fact enjoyed such light, thereby acquires a prescriptive right to such extraordinary enjoyment. This question was discussed in *Lanfranchi v. Mackenzie* (g), *Dickinson v. Harbottle* (h), *Mackey v. Scottish Widows' Society* (i), *Lazarus v. The Artistic Photographic Co.* (k), and *Parker v. Stanley* (l), and was finally decided in the negative in *Ambler v. Gordon* (m). "I think," said Bray, J., in giving judgment in that case, "the result of the judgment in *Colls' Case* is to show that the test of the right is whether the obstruction complained of is a nuisance. If one turns to the nuisance cases, do we find any trace of a doctrine that a person in bad health or carrying on a delicate trade is entitled to more comfort or freedom from annoyance than ordinary people, because for twenty years his neighbours have been aware of his state of health, or the trade he was carrying on, and have left him undisturbed? I am not aware of any decision which suggests it. Such a proposition sounds absurd. Again, I think in many of the judgments, in *Colls' Case* and in other cases, it is implied, if not expressed, that, in measuring the quantum of light to which the owner of the dominant tenement is entitled, the purpose for which he desires to use or uses the light should be disregarded and does not either enlarge or diminish the easement which he has acquired. See especially the judgment of Lord Davey, where he says (n), 'It is agreed on all hands that a man does not lose or restrict his right to light by non user of his ancient lights or by not using the full measure of light which the law permits. . . . If the actual user is not the test, where the use falls below the standard of what

*Ambler v.*  
*Gordon.*

(d) (1876), L. R. 2 Ch. D. 165; above, p. 330.

(e) (1880), L. R. 14 Ch. D. 228; above, p. 330.

(f) (1883), L. R. 24 Ch. D. 282, above, p. 331.

(g) (1867), L. R. 4 Eq. 421.

(h) (1873), 28 L. T. N. S. 186.

(i) (1877), Ir. R. 11 Eq. 541.

(k) [1897] 2 Ch. 214.

(l) (1902), 50 W. R. 282.

(m) [1906] 1 K. B. 417.

(n) [1904] A. C. at p. 203.

[may reasonably be required for the ordinary uses of inhabitancy and business, why (it may be asked) should it be made a test where the use has been of a special or extraordinary character in excess of that standard?'] So in *Yates v. Jack* (o), Lord Cranworth rejects the argument of the defendant that the plaintiff's present business did not require a strong light, and for this business there remained a sufficient light. So, again, in *Courtauld v. Legh* (p), it was held that the right was acquired, although for a part of the twenty years the house was uninhabited and unfit for habitation. It was well observed by Mr. Waugh in his argument for the defendant that the special user on which the claim is founded is a user on the dominant tenement and not on the servient tenement. The servient tenement is not in any way affected by it. If the true doctrine be that which is laid down in *Colls' Case*, that by twenty years' user all that is acquired is a right to prevent the defendant from building so as to interfere with the light previously enjoyed so materially as to amount to a nuisance, I think it would not be logically consistent with this doctrine to hold that a larger right can be acquired. I think also that to introduce the element of the quantum of user would work inconvenience and introduce uncertainty. If the only right capable of being acquired be sufficient light for the ordinary uses of inhabitancy and business, the owner of the servient tenement knows his exact position; he knows within reasonable limits how high he can raise his buildings, and whether during the twenty years it is worth his while to obstruct his neighbour's windows. If a right to special light be capable of acquisition without his knowledge, he cannot know his position; and if he has notice of some special light being required for his neighbour's business, he cannot measure the extent with any exactitude. It seems to me altogether unreasonable to presume that any man would have made a grant of such an indefinite easement. On the whole I think both reason and authority compel me to decide this point against the plaintiffs" (q).

Extent of  
right  
acquired.

*Ambler v.  
Gordon.*

In the course of the argument in *Colls' Case* (r) Lord Robertson said, "Can a man by making one window where there should be five to give proper light, and living twenty years in this cave, prevent his neighbour from building a house which would have done no harm to the light if there had been five windows?" A

Bad light.

(o) (1866), L. R. 1 Ch. 295.

(p) (1869), L. R. 4 Exch. 126.

(q) Cf. *Corbett v. Jonas*, [1892] 3 Ch. 137, a case of implied grant.

(r) [1904] A. C. 181.



Extent of  
right  
acquired.

[question of this nature may hereafter arise ; but there is no doubt that in many cases a window having what is called "a bad light" has received even greater protection from the Courts than the window of a well-lighted room.

Use of light  
not the test.

In connection with this question reference may also be made to certain cases in which it appears to be suggested that the right of the dominant owner is dependent to some extent on the purposes for which he uses the light ; so that if during the statutory period he has used the premises for some purpose not requiring the ordinary amount of light, his right would be limited to the amount of light in fact used. This suggestion is, perhaps, founded on the case next cited.]

*Martin v.  
Goble.*

In *Martin v. Goble* (s) an action was brought for obstructing lights. It appeared that the building in question had stood between thirty and forty years and had formerly been used as a malt-house ; but about seven years before the commencement of this suit it was converted into a parish workhouse. The evidence was contradictory as to the amount of light obstructed by the wall built by the defendant. Macdonald, C. B., said, "It was not enough that the windows were, to a certain degree, darkened by the wall which the defendant had erected on his own ground. The house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house ; the converting it from the one into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his own, suddenly impose a new restriction on his neighbour. This house had for twenty years enjoyed light sufficient for a malt-house ; and up to this extent, and no further, the plaintiffs could still require that light should be admitted to it. The question, therefore, was whether, if it still remained in the condition of a malt-house, a proper degree of light, for the purpose of making malt, was now prevented from entering it by reason of the wall which the defendant had erected." The report does not state whether any new windows had been made in the house upon the change in its destination, or whether any alteration had been made in the form or size of the ancient windows, or other apertures, for admitting light, [and, except upon the assumption that new windows had been made, or increased light obtained by some other structural alteration, the case cannot now be relied upon as an authority for the above proposition (t).

(s) (1808), 1 Camp. 320.

(t) See *Yates v. Jack* (1886), L. R. 1

[It has been held to be no answer to a suit for obstruction of light that the plaintiff has obtained as much additional light in another direction as the defendant is about to obstruct. "The right is a right between the owner of the dominant and the owner of the servient tenement. He has a right to as much light over his neighbour's land to and for the use of his house as he enjoyed twenty years ago, and the neighbour has no right to deprive him of such light, because the owner of the dominant tenement has, either by purchase from, or by the free gift of any other person, or by the operation of an Act of Parliament, obtained other light in addition to that which he had a prescriptive right to" (u). It is not clear whether this decision still holds good to its full extent; but at all events it appears that other light which may at any time be obstructed should be left out of consideration (x).

Extent of  
right  
acquired.  
Other light.

If an actionable nuisance is proved, it is not sufficient for the person who obstructs the light to offer to patch up the injury he is doing by putting glazed tiles in front of the windows in question. "A person who wishes to preserve his light has no power to compel his neighbour to preserve the tiles or a mirror (which might be better), or to keep them clean; nor has he covenants for these purposes that will run with the land or affect persons who take without notice. And, therefore, it is quite preposterous to say, Let me damage you, provided we apply such and such a remedy" (y).]

Glazed tiles.

By the laws of all countries, and by the English law at a very early period, it appears that an action would lie for the obstructing of ancient lights (z). Although, however, by the civil law, a servitude of prospect could be acquired in the same manner as any other servitude, the law of England recognizes no such right (a), except by express grant or covenant. Of the existence of the right when so created the squares in London afford well-known instances. The validity of restrictions thus imposed is fully

Easement of  
prospect not  
acquired by  
enjoyment.

Ch. 295; *Calcraft v. Thompson* (1867), 15 W. R. 387; *Young v. Shaper* (1872), 21 W. R. 135; *Aynsley v. Glover* (1874), L. R. 18 Eq. 548; 10 Ch. 283; *Moore v. Hall* (1878), L. R. 3 Q. B. D. 178; *Att.-Gen. v. Queen Anne, &c. Mansions, Ltd.* (1889), 5 T. L. R. 430; *Dicker v. Fopham* (1890), 63 L. T. N. S. 379; *Colls' Case*, [1904] A. C. 211, per Lord Lindley; and cases quoted above, p. 332.

(u) *Dyers' Co. v. King* (1870), L. R. 9 Eq. 438.

(z) See per Lord Lindley in *Colls' Case*,

[1904] A. C. at p. 211; and *Kine v. Jolly*, [1905] 1 Ch. at pp. 493, 497; [1906] A. C. 7.

(y) Per Wood, V.-C., in *Dent v. Auction Mart Co.* (1866), L. R. 2 Eq. 238, 251. Cf. *Mackey v. Scottish Widows' Society* (1877), Ir. R. 11 Eq. 541.

(z) *Aldred's Case* (1611), 9 Rep. 58 b, and cases there cited.

(a) "The law don't give an action for such things of delight." *Aldred's Case*, ubi sup.

Easement of prospect not acquired by enjoyment.

*Att.-Gen. v. Doughty.*

recognized by the Lord Chancellor in the case of *Squires v. Campbell* (b).

In *The Attorney-General v. Doughty* (c), a motion was made for an injunction to restrain the defendant from proceeding with a certain building which would intercept the prospect from Gray's Inn Gardens; and the report states "that the interposition of the Court was desired, not on the foundation of a nuisance, but on a long enjoyment of right to this prospect by this Society, which right had been admitted formerly by parties concerned to dispute it, and by a court of equity; namely, in 1686, when several orders on petitions were made by Lord Jefferies to restrain the building so as to intercept this prospect: and the manner of defence thereto shows this right of the Society was not disputed, it only going upon this, that the Court was imposed on by the plans shown. That rights of this kind have been taken notice of, appears from the Act of Parliament made for adorning Lincoln's Inn, where the parties acquiesced under such a right." Lord Hardwicke, however, refused to grant an injunction before answer, saying, "I know no general rule of common law which says that building so as to stop another's prospect is a nuisance; was that the case, there could be no great towns, and I must grant injunctions to all the new buildings in this town. It depends on a particular right, and then the party must first have an opportunity to answer it. As to the orders made by Lord Jefferies, who was too apt to do things in an extraordinary manner, fortiter in modo as well as in re, they were made on petition, without a bill filed, and those I lay out of the case. There may be such a right as this, as in the case of the Act of Parliament touching Lincoln's Inn. That was upon agreement of the parties, which, if shown here, it would be different, or if there was ground to presume such an agreement."

[In *The Fishmongers' Co. v. The East India Co.* (d), Lord Hardwicke says, "It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant; but that is no reason to hinder a man from building on his own ground."

(b) (1836), 1 Mylne & Craig, 459. [See *Tulk v. Moxhay* (1848), 2 Phil. 774; 78 R. R. 289; *Western v. MacDermott* (1866), L. R. 2 Ch. 72; *Piggott v. Stratton* (1849), Johns. 341; *McLean v. McKay* (1873), L. R. 6 P. C. 327. A grant will not be manufactured out of

the common covenant for quiet enjoyment: *Potts v. Smith* (1868), L. R. 6 Eq. 311.]

(c) (1788), 2 Ves. sen. 452.

(d) (1751), 1 Dickens, 163. Cf. *Knock v. Richardson* (1681), 1 Mod. 55.

[Similarly in *Butt v. Imperial Gas Co. (e)*, it was decided that the plaintiff could not complain of the erection of a gasometer on the defendants' premises merely on the ground that it would prevent the plaintiff's premises and name-board from being seen from the high road, and so deprive him of chance customers. Apparently the name-board had not stood for twenty years; but if it had, the decision would have been the same (*f*).]

Right to have premises seen not acquired by enjoyment.

And conversely, no action would lie for the loss of privacy or amenity by the opening of windows in a neighbouring house (*g*), or a public road over neighbouring lands (*h*).

Privacy.

Although in this country, owing to the great value of land in cities and the small extent of properties, men are tenacious of every ray of light, and go through an immense amount of litigation to assert their right to it, in some of the United States of America the doctrine of the English law does not prevail, and a right to light cannot be acquired by prescription or implied grant; the Courts there applying to the case of windows the reasoning in *Webb v. Bird (i)*. In other States the rule of the English law is adopted (*k*). It is argued that a man may easily acquire a fringe of land surrounding his house to supply himself with light for his windows, and his neighbour may abstain from building on his land to the obstruction of his windows for a number of years for reasons other than because he is under an obligation not to build.]

Law of America.

By the civil law, the servitude "*ne luminibus officiatur*" was one of the ordinary urban servitudes (*l*); a similar servitude also

Civil law.

(e) (1866), L. R. 2 Ch. 158.

(f) See *Smith v. Owen* (1866), 35 L. J. Ch. 317; 14 W. R. 422; and per Lord Blackburn in *Dalton v. Angus* (1881), L. R. 6 App. Cas. 821.

(g) *Chandler v. Thomson* (1811), 3 Camp. 80; 13 R. R. 756; cf. *Potts v. Smith* (1868), L. R. 6 Eq. 311, at p. 318.

(h) See *Re Penny* (1857), 7 E. & B. 660; *Duke of Buccleuch v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221, 237. *Lord Mannors v. Johnson* (1875), L. R. 1 Ch. D. 673, was a case of express covenant.

(i) Below, p. 339. "There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, and I see that it

has recently been sanctioned with some qualifications by an Act of Parliament; but it cannot be applied in the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law; and, besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775. There were two *nisi prius* decisions at an earlier day; but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of *Darwin v. Upton* was decided by the K. B. This was clearly a departure from the old law."—Per Bronson, J., in *Parker v. Foote*, 19 Wend. (N. Y.) 309.

(k) Washburn on Easements, 583.

(l) *Cum autem servitus imponitur—*

existed for the right of prospect (*n*), which appears to have been very extensive.

Air.

The right to the enjoyment of air is, generally speaking, at common law, governed by the same principles as those which regulate the passage of light; [so that, while no right can be acquired to have a free circulation of air over a vacant piece of ground, or over or round a building placed upon the land (the enjoyment being both indefinite and practically incapable of being interrupted) (*n*), the right to the access of air to a house through definite apertures opened for the purpose is one which can apparently be acquired by user at common law, or by prescription (*o*), and it is not necessary that there should be a defined channel over the servient tenement through which the air flows (*p*).]

Cases of  
windmills.

The old authorities, indeed, mention a singular case of an easement of this kind, which might have the effect of imposing very extensive restrictions upon the owners of the neighbouring land.

Winch, J., said, "That where one erected a house so high that the wind was stopped from the windmills in Finsbury Fields, it was adjudged that it should be broken down" (*q*).

And, again, "in an assize of nuisance, brought because levavit domum ad nocumentum of his mill, by which the wind is stopped to come at his mill, so that he cannot grind, &c., and the jury find that the defendant has erected a house de novo, and that only two yards of the top of the house is to the nuisance, this is found for the plaintiff, for here the declaration is not falsified (*r*),

*ne luminibus officiatur*—hoc maxime adepti videmur, ne jus sit vicino, invitis nobis, altius edificare, atque ita minuere lumina nostrorum ædificiorum.—Dig. 8, 2, 4, de serv. præd. urb.

(*m*) Est et hæc servitus—ne prospectui officiatur.—Dig. 8, 2, 3.

Inter servitutes, *ne luminibus officiatur, et ne prospectui offendatur*, aliud et aliud observatur; quod in prospectu plus quis habet ne quid ei officiatur ad gratiorem prospectum et liberum: in luminibus autem (non officere) ne lumina cujusquam obscuriora fiant; quodcumque igitur faciat ad luminis impedimentum, prohiberi potest, si servitus debeat.—Ibid. 15.

(*n*) *Harris v. De Pinna* (1886), L. R. 33 Ch. Div. 238.

(*o*) *Cable v. Bryant*, [1908] 1 Ch. 259; per Neville, J., at p. 264; but see *Bryant v. Lefever*, post, p. 340.

(*p*) *Cable v. Bryant*, ubi sup.

(*q*) Viner's Abridg. Nuisance, G. pl. 19. [Taken from Winch's Reports, 3, where, in what professes to be a report of the proceedings of the Court of Common Pleas in E. 19 James I, it is said: "Winch said that it was adjudged in this Court, that where one erected a house so high in Finsbury Fields, by the windmills, that the wind was stopped from them, that it was adjudged in this case that the house shall be broken down." These Reports professing to be a translation of the judge's own notes, it seems strange that, instead of reporting a case, he should record an anecdote told by himself in Court, and speak of himself in the third person. This is explained by the fact mentioned, in the preface to Benloe and Dalison, that Winch's Reports are improperly ascribed to that learned judge.]

(*r*) This is erroneously printed "satisfied" in Viner, Nuisance, N. 2, pl. 6.

but only abridged, and the judgment shall be, that the two yards be dejected." M. 11 Jas. 1, inter *Goodman and Gore and others*, adjudged (s).

[But, in view of the later decisions, these authorities can no longer be considered good law, and the right acquired by user must be confined to the access of air through a definite aperture. Easement of air.

Thus, in *Webb v. Bird* (t), it appeared that the plaintiff's wind- *Webb v. Bird.*

(s) 2 Rolle's Abr. 704, Triall. C. pl. 23. [The case referred to by Rolle is reported in Godb. 221, as *Traherne's Case* (C. P. 11 James), where, in an assize of nuisance, the plaintiff showed that he had a windmill, and that the defendant built a house so as it hindered his mill. The jury found that the defendant built the house, but that only two feet of it did hinder the plaintiff's mill, and was a nuisance. The Court (Hobart, C. J.) was of opinion that but part of the house should be abated, viz., that which was found to be a nuisance.

In *Goodman and Gore's Case* (C. P. 10 Jas. Godb. 189), Goodman brought an assize against Gore and others for erecting two houses to the west end of his windmill, per quod ventus impediretur, &c. It was given in evidence that the houses were about eighty feet from the mill in height, did extend above the top of the mill, and in length were twelve yards from the mill; and, notwithstanding, the Court (Coke, C. J.) directed the jury to find for the defendant (1861, see 10 C. B. N. S. 273, n.).

On the cases in Rolle and Winch, Willes, J., observes that there was a distinction between ordinary mills and the prescriptive right which the lord of a manor had to compel all residents within the manor to grind their corn at his mill. Privileged mills of that description had peculiar rights. (10 C. B. N. S. 285.)

These three windmill cases may perhaps be reduced to one, and that a case considered by the lawyers of the time as of no authority on the subject of easements. The first was tried before Coke, C. J., in 10 Jas. 1, reported by Godb. 189, as *Goodman v. Gore and Others*. It will be seen by the report that Lord Coke displayed a disposition to trip the plaintiff up on a point of form, a circumstance consistent with the fact of the house being built contrary to a royal proclamation which he would not directly oppose, as he was then on his preferment, being then Chief Justice of the Common Pleas,

and soon after appointed Chief Justice of the King's Bench. His opinion of these proclamations may be seen in 3 Inst. 201, "Of Buildings," where he says, "We have not read of any *Act of Parliament* now in force made against the excess of building, or touching the order or manner of building; but it is a wasting evil whereunto some wise men are subject." Also in 12 Rep. 74. The second case was tried the following year before Hobart, C. J., and brought to a more successful issue. It is cited by Rolle as *Goodman v. Gore*: the same as that given to the first by Godbolt. Rolle does not refer to Godbolt, and probably took the case from his own notes before Godbolt was published. Godbolt was published in 1652, when Rolle was Chief Justice of the Upper Bench. Winch, eight years afterwards, says that such a case had been adjudged in the Common Pleas, and his description of the case fits the cases in Godbolt. As to the authority of the windmill case, it is mentioned neither by Coke nor Hobart. Coke in his chapter on buildings (3 Inst. 201), says, "Also the common law prohibits the building of any edifice to the common nuisance or to the nuisance of any man in his house, as the stopping up of *his light*, or to any other prejudice or annoyance of him." Rolle does not abridge it under the head of "*Nusance*," where he abridges the judgment of Wray, C. J., in *Aldred's Case*, as to the stoppage of air to windows, but under the head of "*Trial*," as an authority for the position that where a plaintiff declares that a whole building is a nuisance, and the jury find part only to be so, the action shall not entirely fail.

In old maps of London, a row of windmills appears on the heights to the north of London. Probably in the time of King James it was thought an alarming circumstance as affecting the supply of food to the city, that any one should build so near them as to take the wind from their sails.]

(t) (1861—3), 10 C. B. N. S. 268; 13 C. B. N. S. 841.

Easement of  
air.

*Webb v. Bird.*

[mill was built in 1829. The defendant, in 1859 and 1860, built a school-house within twenty-five yards from the mill, which obstructed and diverted the currents of air that would otherwise have passed to the mill. The Court of Common Pleas held that, as the plaintiff's mill was erected within time of legal memory, there could be no prescription at common law; nor could the plaintiff prescribe under the Prescription Act, because the easements contemplated by the second section were only such as were to be exercised upon or over the soil of an adjoining owner and were capable of interruption (*s*). The Exchequer Chamber agreed with the Common Pleas that the right to the passage of air was not a right to an easement within the meaning of 2 & 3 Will. 4, c. 71, s. 2; and held, further, that the claim could not be supported upon the presumption of a grant arising from the uninterrupted enjoyment as of right for a certain term of years, because they thought, in accordance with the judgment of the House of Lords in *Chasemore v. Richards* (*t*), that the presumption of grant from long-continued enjoyment only arose where the person against whom the right was claimed might have interrupted or prevented the exercise of the subject of the supposed grant; and in the case of the windmill, it would be, if not absolutely impossible, yet so difficult to prevent the exercise of the right claimed, that no presumption of a grant, or easement in the nature of a grant, could be founded upon the non-interruption of the exercise of the alleged right by the person against whom it was claimed. Blackburn, J., said that he wished to guard against its being supposed that anything in the judgment affected the common law right that might be acquired to the access of light and air through a window.

*Bryant v.  
Lefever.*

In *Bryant v. Lefever* (*u*), the plaintiff and the defendants were occupiers of adjoining houses, which had remained in the same condition for some thirty or forty years. The defendants, in rebuilding their house, carried up the building much beyond its former height, and stacked timber on the roof, thereby causing the plaintiff's chimneys to smoke whenever he lighted fires. The plaintiff claimed a right to have the free access of air to his chimneys, and added a claim in respect of nuisance. The facts being proved, Lord Coleridge, C. J., gave judgment for the plain-

(*s*) See above, p. 236.

(*t*) (1859), 7 H. L. C. 349.

(*u*) (1879), L. R. 4 C. P. Div. 172.  
Cf. *Chastey v. Ackland*, [1895] 2 Ch. 389; [1897] A. C. 155.

[tiff; but, on appeal, judgment was entered for the defendants on the authority of *Webb v. Bird*. Easement of air.

The allegation of nuisance was disposed of by the answer that the smoke was produced by the plaintiff. *Bryant v. Lefever.*

As to the claim to the access of air, the Lords Justices held that there was no natural right to such access; for the establishment of such a right would prevent every adjoining owner from making a reasonable use of his land. Neither could the right be acquired by prescription at common law,—for the building of a house did not increase the natural right in respect of the land; nor by the doctrine of lost grant,—which was only ancillary to common law prescription; nor under the Prescription Act, which did not apply to air. The claim was vague and uncertain, and the enjoyment incapable of being interrupted by any reasonable means. Lord Justice Cotton added that “it was unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour’s property had been enjoyed as of right for a sufficient period, a right by way of easement could be acquired” (x).

On the other hand, in *Moseley v. Bland*, cited in *Aldred’s Case* (y), Wray, C. J., said that, for stopping as well of the wholesome air as of light, action lies and damages shall be recovered; for both are necessary. And, if the stopping of the wholesome air, &c., gives cause of action, à fortiori an action lay in the case at bar for infecting and corrupting the air. This judgment is thus abridged by Rolle (z):—The stoppage of salubrious air is a nuisance as well as the stoppage of light. Air through windows.  
*Moseley v. Bland.*

In *Gale v. Abbott* (a), and *Dent v. Auction Mart Co.* (b), *Gale v. Abbott.* injunctions were granted to remove and prevent impediments to ventilation. In the first case the defendant was ordered to remove a skylight which he had placed over his yard, and which materially impeded the passage of air to the window of the plaintiff’s back kitchen. It was by that means alone that a thorough ventilation existed to the plaintiff’s house, and the benefit therefore was not inappreciable. In the other case, Wood, V.-C., says: “There is a staircase lighted in a certain manner by windows, which when open admit air. The defendants are about to shut up these windows, as in a box with the lid off, by a wall about eight or nine feet distant, and some forty-five feet high; and in that circumscribed space they purpose to put *Dent v. Auction Mart Co.*

(x) Cf. *Harris v. De Pinna* (1885), L. R. 33 Ch. Div. 238.

(y) (1611), 9 Rep. 58 b.

(z) 2 Rol. Abr. 141, *Nusans*, G. pl. 16.

(a) (1862), 8 Jur. N. S. 987.

(b) (1866), L. R. 2 Eq. 238.



Easement of  
air.Air through  
windows.*Dent v.*  
*Auction Mart*  
*Co.*

[three water-closets. There are difficulties about the case of air as distinguished from that of light. But the Court has interfered to prevent the obstruction of all circulation of air; and the introduction of three water-closets into a confined space of this description is, I think, an interference with air which this Court will recognize on the ground of nuisance. This is, perhaps, the proper ground on which to place the interference of the Court, although in decrees the words light and air are often inserted together, as if the two things went *pari passu*.”

*Johnson v.*  
*Wyatt.*

In *Johnson v. Wyatt* (c), an injunction to restrain the obstruction of air coming to ancient windows was refused by the Lords Justices, on the ground that the obstruction would be casual and temporary only, depending on the direction of the wind.

*Baxter v.*  
*Bower.*

In *Baxter v. Bower* (d), an injunction had been granted by Bacon, V.-C., against permitting so much of a shed to remain as would intercept the passage of light and air to the windows of the plaintiff's chapel. The Lords Justices on appeal struck out of the order so much as related to air, on the ground that there was no evidence as to interference with air.

*Hall v.*  
*Lichfield*  
*Brewery Co.*

In *Hall v. Lichfield Brewery Co.* (e), the plaintiff had, for upwards of thirty years, enjoyed a free access of air to his slaughter-house through two apertures. Fry, J., said that the right to the access of air could undoubtedly be acquired at common law, not by prescription, but by an implied covenant. In the case of a dwelling-house the covenant was “not to interrupt the free use of salubrious air.” In the case before him, the implied covenant was “not to interrupt the free access of air suitable for the purpose of a slaughter-house.” His Lordship gave damages for the injury.

*Bass v.*  
*Gregory.*

In *Bass v. Gregory* (f), the plaintiffs succeeded in establishing a prescriptive right to ventilate their cellars by means of a shaft communicating with a disused well owned by the defendant.

*Aldin v.*  
*Latimer Clark,*  
*Muirhead & Co.*  
*Cable v.*  
*Bryant.*

*Aldin v. Latimer Clark, Muirhead & Co.* (g) is a case of implied grant of the access of air to timber sheds.]

In *Cable v. Bryant* (h), the common owner of the dominant and servient tenements conveyed the dominant tenement to the plaintiff, and afterwards conveyed the servient tenement to the defendant.

(c) (1863), 2 De G. J. & S. 18; 9 Jur. p. 238.  
N. S. 1333.

(d) (1875), 44 L. J. Ch. 625.

(e) (1880), 49 L. J. Ch. 655; 43 L. T.  
330. Cf. *Cable v. Bryant*, W. N. (1900)

(f) (1890), L. R. 25 Q. B. D. 481.

(g) [1894] 2 Ch. 437.

(h) [1908] 1 Ch. 259.

The servient tenement was in lease at the date of the conveyance of the dominant tenement to the plaintiff, and the lease was still in existence at the date of the conveyance of the servient tenement to the defendant, but the lessee joined in the latter conveyance to merge the term. Subsequently the defendant erected a hoarding on his land which entirely closed two windows or ventilators in a stable standing on the plaintiff's land. In an action brought by the plaintiff in respect of this obstruction, it was held, on the principle that a man may not derogate from his grant, that a right to the access of air was to be implied, although there was no defined channel over the servient tenement through which the air flowed, and a mandatory injunction was granted for the removal of the hoarding.

Easement of  
air.

It may be observed here, that the right to a lateral passage of air, as well as to a flow of water, superadds a privilege to the ordinary rights of property, and is quite distinct from that right which every owner of a tenement, whether ancient or modern, possesses to prevent his neighbour transmitting to him air or water in impure condition; this latter right is one of the ordinary incidents of property, requiring no easement to support it, and can be countervailed only by the acquisition of an easement for that purpose by the party causing the nuisance (*i*).

Right to prevent access of impure air or water not an easement.

By the custom of London, a man might rebuild his house, or other edifice, upon the ancient foundation to what height he pleased, though thereby the ancient windows or lights of the adjoining house were stopped, if there were no agreement in writing to the contrary (*j*).

Custom of  
London.

In all cases *where the right is claimed under the statute*, a justification of a disturbance by force of this custom is taken away by the express enactment of the statute (s. 3), "any local custom or usage notwithstanding" (*k*).

(i) [Cf. as to water, above, p. 310.]

(j) Com. Dig. London, N. (5); *Winstanley v. Lee* (1818), 2 Swans. 239.

(k) Since so decided in *Saltera's Co. v. Jay* (1842), 3 Q. B. 109; 2 Gale & D. 414; [and by the Court of Exchequer Chamber, *Truscott v. Merchant Taylors' Co.* (1856), 11 Exch. 855; see *Cooper v. Hubbuck* (1862), 12 C. B. N. S. 456; *Yates v. Jack* (1866), L. R. 1 Ch. 299; *Dent v. Auction Mart Co.* (1866), L. R. 2 Eq. 249.

In the *Carriers' Co. v. Corbett* (1865) (11 Jur. N. S. 719), it was argued, from air

not being mentioned in sect. 3 of the Prescription Act, that the custom of London, as to building on an ancient foundation, was not affected by it so far as it related to the obstruction of air, and a formal objection was made to a decree of the Vice-Chancellor for an injunction on this ground. Turner, L. J., said that he should not be disposed to come to any decision upon it without some further evidence of the custom of the city extending to air, as well as light, of which there was no evidence. See, too, *Dickinson v. Harbottle* (1873), 28 L. T. N. S. 186.]

## CHAPTER III.

## WAYS.

RIGHTS of way are at once the most familiar and important of the class of affirmative easements which impose upon the owner of the servient tenement the obligation to submit to something being done within the limits of his own property.

Ways non-continuous easements.

Way to church.

Rights of this nature are, in their exercise, intermittent; falling within the division of non-continuous easements already alluded to. These rights are in their extent susceptible of almost infinite variety: they may be limited both as to the intervals at which they may be used—as a way to church (*a*), and the actual extent of user authorized—as a foot-way, horse-way, or carriage-way.

(*a*) Viner's Abr. Nuisance, H., 15, citing 20 Ass. 18; 33 H. 6, 26.

[The Year Books cited in Viner relate to a private way to a church appurtenant to the house of a parishioner, and to the same effect is Brooke's Abr. Chimyne, pl. 2, cited Com. Dig. Chimin. D. 2.]

But there may, it seems, be another description of way to a church for all the inhabitants of the parish by custom (see above, p. 3). To this description of way the following authorities refer:—F. N. B. 183, n. (427). A man shall not have a writ of assize of nuisance for a way to a church, because he has no freehold in the church. 4 Edw. 3, Nuisance, 8. *Hill v. Bedoe*, 16 James, 2 Rol. Rep. 41; 2 Rol. Abr. 287, Prohibition, F., pl. 48; Vin. Abr. Prohibition, F., pl. 48, between the churchwardens of Bithorne and Bowe. The churchwardens sued in the Spiritual Court for a way to the church, which they claimed to appertain to all the parishioners by prescription. The defendant denying the prescription, a prohibition was granted. (*Smith v. Bennett*, 15 Car., March, 45, pl. 70; 2 Rol. Abr. 286, Prohibition, F. 47; Vin. Abr. Prohibition, F. 47.) Brackley and Cooke said, a libel may be in the ecclesiastical

court for not repairing a way that leadeth to a church, but not for not repairing a highway. These cases are referred to by Ayliffe (l'ar. 438) and Gibson (Cod. 293) as authorities that the right to a church path, or the obligation to repair it, are within the jurisdiction of the ecclesiastical court (see also *Walter v. Montague*, 1 Curt. 261; 1 Burn. Ecc. Law, 395). In *Austin's Case* (H. 23 & 24 Car. 2; 1 Vent. 189), Lord Hale says, "If a way lead only to a church, to a private house or to fields, 'tis a private way." In *Throuer's Case* (P. 24 Car. 2; 1 Vent. 208), the defendant was indicted for stopping a common footway to the church at Whitby. It was objected, that an indictment would not lie for a nuisance to a church path, but suit might be in the ecclesiastical court, and that the damage was private and concerned only the parishioners. Lord Hale says, if this were a common footway to the church for the parishioners, the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits (see also per Dodderidge, J., *Sury v. Pigott* (1625), 3 Bulst. 340; and per Willes, C. J., *Drake v. Wiglesworth*, Willes, 658). Referring

Thus, a way may be granted for agricultural purposes only (*b*), or for the carriage of coals only (*c*), or for the carriage of all other articles except coals (*d*).

Ways non-continuous easements.

The civil law also recognised the validity of such modified rights (*e*).

Like other easements, rights of way may be acquired by user. But as such user is not continuous and may vary at different times, great difficulties are presented both in law and in fact in determining the amount of right conferred by it; though the maxim, "omne majus continet in se minus," seems equally applicable here as in other cases. The real difficulty is to ascertain what constitutes the relative majus and minus in rights of this

Degrees of ways.

to these cases, it is said in *Bac. Abr.* (Highways, A.), that a way to a parish church, or to the common fields of a town or to a village which terminates there, may be called a private way, because it belongs not to all the king's subjects, but only to the particular inhabitants of such parish, house, or village, each of whom, as it seems, may have an action for a nuisance therein. But in *Finch v. Hovenden* (Cro. El. 664), where a way was claimed for all the inhabitants of the city of Canterbury, it was held, that without a special grievance shown by the plaintiff, an action lies not, and a case of *Westbury v. Powell* is there referred to of an action having succeeded by an inhabitant of Southwark for an obstruction of a watering-place common to the inhabitants of Southwark.

On the authority of this case of *Westbury v. Powell*, it was held in *Harrop v. Hirst* (1868), L. R. 4 Ex. 43, that the plaintiffs, who, in common with other inhabitants of a district, enjoyed a customary right to have water from a spout for domestic purposes, were entitled to an action for diverting the water without proof of special damage.

A right of way cannot be claimed by parishioners by dedication within time of memory. In *Ventry of Bermondsey v. Brown* (1865), L. R. 1 Eq. 204, Romilly, M. R., says, "I do not doubt a parish might possess as private property a right of way as this ten-foot way in the same manner as they might possess a field, but it must be by grant from the owner of it; neither do I doubt that, if such a use was conferred on the parishioners, a dedication to the public would not be presumed without cogent evidence. A dedication to the parish

by the owner of the soil cannot be presumed. A dedication from user can only be presumed in favour of the public generally, and not in favour of the inhabitants of a particular parish. This is laid down in *Poole v. Huskinson* (1843), 11 M. & W. 827; 63 R. R. 782, and is unquestionable law." (Page 215.) *Mounsey v. Iamay* (1863), 1 H. & C. 729, is an authority that such a way may be claimed by immemorial custom, but not by prescription under the Prescription Act. 3 H. & C. 486.

Interference with a pathway forming part of the parish churchyard is actionable in the Ecclesiastical Court, and the High Court will not entertain jurisdiction. *Batten v. Gedge* (1889), L. R. 41 Ch. D. 507.]

(*b*) *Reignolds v. Edwards* (1741), Willes, 282. See below, p. 357.

(*c*) *Iceson v. Moors* (1700), 1 Ld. Raym. 486; S. C., 1 Salk. 15.

(*d*) *Marquis of Stafford v. Coyney* (1827), 7 B. & C. 257; 31 R. R. 186. See also *Jackson v. Sacey* (1816), Holt, N. P. C. 455; 17 R. R. 663; [*Tomlin v. Fuller* (1681), 1 Mod. 27; *Bladder v. North Staffordshire Rail. Co.* (1878), L. R. 4 Q. B. Div. 412.]

(*e*) *Modum adjici servitutibus posse constat; veluti quo genere vehiculi agatur, (vel non agatur,) veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex ille transducat, aut carbo portetur. Intervalla dierum et horarum non ad temporis causam sed ad modum pertinent jure constitutæ servitutis.*—Dig. 8, 1, 4, §§ 1, 2, de serv.

*Usus servitutum temporibus accerni potest; fortè ut quis post horam tertiam usquo in horam decimam eo jure utatur, vel ut alternis diebus utatur.*—*Ibid.* 6, § 1.

Degrees of ways.	nature. A man may allow the passage of foot passengers and carriages near his house, and yet refuse permission to drive cattle along the same road.
Iter.	Lord Coke, citing the authority of Fleta and Bracton ( <i>f</i> ), says, "There are three kinds of ways: first, a foot-way, which is called iter, quod est jus eundi vel ambulandi homini; and this was the first way. The second is a foot-way and a horse-way, which is called actus, ab agendo; and this vulgarly is called pack and prime way, because it is both a foot-way, which was the first or prime way, and a pack or drift way also. The third is via, or aditus, which contains the other two, and also a cart-way, &c.; for this is jus eundi, vehendi, et vehiculum et jumentum ducendi" ( <i>g</i> ).
Actus.	
Via.	

The distinctions here taken by Lord Coke, which, in the terms used at all events, correspond with the definitions of the civil law, appear to be of no practical utility. If this division into three classes were rigorously observed, the second comprehending the rights peculiar to the first class, and the third those both of the second and first, it is obvious that the establishment of a right to do any one of the things comprised in a superior class would at the same time establish a right to do, not only all the acts comprised in the inferior classes, but also all the other acts comprehended in that class of which it forms but a single instance. But such is clearly not the case by the law of England, in which it has been expressly decided that a right which, adopting Lord Coke's definition, is of the highest class, as, for instance, a right to drive carts, does not of necessity include the right to drive cattle, ranged by him in the subordinate class (*h*).

Extent of right a question for the jury.

Although Lord Coke has made use of the same terms as the civil law in distinguishing the several kinds of way, yet he appears by no means to have attached the same meaning to them. Thus, the jus eundi of the civilians, comprised in the first class, included the right of riding on horseback as well as that of walking (*i*); the actus also appears to be more extensive,

(*f*) Co. Litt. 56 a.

(*g*) The text of the civil law is as follows:—*Iter* est jus eundi ambulandi homini, non etiam jumentum agendi (vel vehiculum). *Actus* est jus agendi vel jumentum vel vehiculum. Ita qui habet iter, actum non habet; qui actum habet, et iter habet, (equus uti potest,) etiam sine jumento. *Via* est jus eundi

et agendi et ambulandi; nam et iter et actum via in se continet.—Inst. 2, 3, præf.

(*h*) *Ballard v. Dyson* (1808), 1 Taunt. 279; 9 R. R. 770; *Conling v. Hugginson* (1834), 4 M. & W. 250; *Higham v. Rabe*, (1839), 5 Bing. N. C. 622; S. C., 7 Scott, 827. [See below.]

(*i*) *Iter* est enim qua quis pedes vel

as comprising a right of passage for some species of carriage (*vehiculum ducere*), though in what precise manner this right was to be exercised appears to be doubtful (*k*); as, unless some restriction is put upon this right, great difficulty must exist in ascertaining the precise distinction between *actus* and *via*.

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To remove this difficulty, one commentator (*l*) has suggested that "the *actus* gave a right of passage only to a small cart or other vehicle drawn or pushed by the hand," thus making the distinctions of the civil law more in accordance with those laid down by Lord Coke.

Lord Stair in his "Institutes," after remarking that by the civil law the greater right of way comprehends the lesser, says, "Our custom sticketh not to this distinction, but measureth the way according to the end for which it was constituted, and by the use for which it was introduced, as having only a foot road, or a road for a horse, to be led or ridden upon, or only a way for leading of loads upon horseback, or a way for leading of carts, or a way for driving of cattle, and is observed accordingly" (*m*).

Lord Stair.

In *Ballard v. Dyson* (*n*), which was an action of replevin, the defendant avowed taking a heifer damage feasant, and issue was joined upon a plea in bar of "a right of way to pass and repass with cattle from a public street through and along a certain yard and way adjoining to the said place, in which, &c., towards and unto certain premises in the plaintiff's occupation as appurtenant thereto." On the trial it appeared that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years; that the folding-doors of it opened, not to the plaintiff's yard, but to a highway; for many years it had been converted to the purposes of a stable; the last preceding occupier, who was a pork butcher, had used it as a slaughter-house for slaughtering his hogs; and the present occupier, who was a butcher, used it as a slaughter-house for slaughtering oxen. The yard in question, along which the right of way to these premises was claimed, was a narrow passage bounded by a row of houses on each side, the doors of which opened into it: when a cart and

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*Dyson.*

*eques commeare potest.*—Dig. 8, 3, 12, de serv. præd. rust.

(*k*) *Actus vero ubi et armenta trajicere et vehiculum ducere liceat.*—Ibid.

[*Qui actum habet, et plaustrum ducere et armenta agere potest.*—Ibid. 7.]

(*l*) Bynkershoek.

(*m*) Book II. tit. 7, § 10; [see the judgment in *Dyce v. Lady James Hay*, 1 M'Q. Sc. Ap. 305, as to the accommodation of a prescriptive right to new inventions].

(*n*) (1808), 1 Taunt. 279; 9 R. R. 770.

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horse was driven through it, the foot passengers could not pass the carriage, but were compelled, on account of the narrowness, to retreat into the houses; and they would be exposed to considerable danger if they were to meet horned cattle driven through it. It was in evidence that the preceding occupier had been accustomed to drive fat hogs that way to his slaughter-house: and that the plaintiff had been accustomed to drive a cart, the only carriage which he possessed, usually drawn by a horse, but in one or two instances by an ox, along this passage to this barn, where he kept his cart; there was then no other way to it. He had lately begun to drive fat oxen that way to the premises for the purpose of killing them there; but there was no evidence of any other user than this of the way for cattle. No deed of grant was produced. The defendant produced no evidence that he had ever interrupted the occupiers of the plaintiff's premises in driving cattle there, nor that they had been usually possessed of horned cattle which had not been driven that way; he admitted that there was sufficient evidence of a right of way for *all manner of carriages*. It did not appear at what period the houses adjoining the way had been built.

For the plaintiff it was contended that a right of way for all manner of carriages necessarily included a right of way for all manner of cattle; and therefore proved the prescription.

Mansfield, C. J., told the jury, that inasmuch as this was a private and not a public way, they were not to conclude that a man might not grant a right of way to pass with horses and carts, and yet preclude the grantee from passing with all manner of cattle; and the degree of inconvenience which would attend the larger grant in this case, furnished an argument against the probability of it. He directed them, therefore, to say whether there was sufficient evidence of a right of way to drive cattle loose, or whether they would consider the grant or prescription as only co-extensive with the use that had been made of it. The jury found a verdict for the defendant.

A rule having been obtained and cause shown, the Court, after taking time to consider, discharged the rule for a new trial. The judgments delivered by the judges were as follows:—

Mansfield, C. J., having adverted to the facts of the case, observed, that “in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for

cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from Hawkins only refers to *Co. Litt.*, and the passage in *Co. Litt.* does not prove that Lord Coke was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual import of the grant. The general description given by Lord Coke does not seem to touch the question. He refers to Bracton (o), who only says 'there are iter, actus, and via'; but says not a word to explain the meaning of either, or the difference between them. Nor can I find in any of the books, nor even in any *nisi prius* case, any decision that throws light upon the subject. A parson has the *via* or *aditus* over a farm with carts to bring home his tithe, but he can use it for no other purpose. I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence, and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way to it, which could be used with very little, if any, inconvenience to himself; yet there it would be a monstrous inference to conclude that, if a butcher could establish a slaughter-house at the inner end of the mews without being indictable for a nuisance, he might, therefore, drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land where, from the nature of the premises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there. The inconvenience in this case is a strong argument against the probability of a larger grant. The defendant was the proprietor of all these houses. My brother Chambre mentioned the case of a public way,

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(o) Lib. 4, fol. 232.



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tion for the  
jury.

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restricted to carriages only, in which some public notice was affixed to caution the public that there was no drift-way, and thought that the absence of such notice in this case was an argument against the probability of the restricted grant. This notice might be requisite in a public way, but in a private way out of which cattle were excepted, the grantor might reasonably think it unnecessary to give his grantee notice of that of which he must already be conusant: he might justly suppose that the grantee, knowing the nature of his right, would not attempt to use the way otherwise than according to his grant. I can find no case in which it has been decided that a carriage-way necessarily implies a drift-way, though it appears sometimes to have been taken for granted. I speak with doubt, because my brother Chambre is of a different opinion; but I incline to hold that the verdict ought not to be disturbed."

Heath, J.: "This is a prescription for a way for cattle, and a carriage-way is proved. A carriage-way will comprehend a horse-way, but not a drift-way. All prescriptions are *stricti juris*. Some prescriptions are for a way to market, others for a way to church, and in the ancient entries, both in *Rastal* and *Clift*, the pleadings are very particular in stating their claims. In *Rastal*, *tit. Quod permittat*, the distinction is clearly seen. Sometimes there is a carriage-way qualified. One claim is remarkable, *fugare quadraginta averia*. The usage then in this case is evidence of a very different grant from that which is claimed, namely, to drive fat oxen, animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighbourhood. The jury having heard the evidence, and formed their opinion upon it, I am not prepared to say that the verdict shall not stand."

Lawrence, J.: "I should have been as well satisfied if the verdict had been the other way, but as the jury have decided upon the evidence, I am unwilling to disturb their verdict. This is the case of a prescriptive private way, which presumes a grant: the question then is, what was the grant in this case? That is to be collected from the use; for it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-way. In the entries are cases of prescription, not for carriages only, but for cattle also. *Co. Ent. 5, 6. Quod permittat ad carriandum et recarriandum blada, fœnum, et fimum, ac omnia alia necessaria sua, cum carris*

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et carectis suis, et ad fugandum omnia et omnimoda averia sua. The person who drew that entry certainly did not conclude that a carriage-way included a drift-way for cattle. The use proved here is of a carriage-way; the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle; for till they were driven there, no opposition could be made, nor the limitation of the right shown; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way, but the user of the way for pigs is not proof of a right of way for oxen. The grantor might well consider what animals it was proper to admit, and what not. The place is very narrow, and full of inhabitants. There is no danger from pigs, and carriages have always someone to conduct them. Cattle may do harm, and passengers cannot always get out of their way; but if the cattle are driven forward serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant."

Chambre, J.: "I think there ought to be a new trial; for all the evidence was on one side, and the verdict went against the evidence. I never thought that a carriage-way necessarily included a drift-way; but I think it is *prima facie* evidence, and strong presumptive evidence, of the grant of a drift-way. Undoubtedly a person may restrict his grant as he pleases, and when he has so limited it, the pleadings must be adapted to the particular grant, which accounts for the variety in the entries. But it rests with the grantor to prove the restriction of the grant; otherwise it must be intended to be of the usual extent. This inconvenience indeed may occur from such a determination, that, if the evidence be lost, the grantor may lose the benefit of his restriction, but he may and ought to preserve the evidence of the restriction; and the inconvenience would be of small extent; for I believe the cases are very few where a carriage-way has not been accompanied with this right. There seems to be almost a necessity for including it. The grantee may send back his horses without his carriage. He may draw his carriage with oxen, and the oxen, as well as the horses, must be driven back loose to pasture. There is strong presumptive evidence then of a drift-way. If the burthen of the proof lies on the *tertenant*, it certainly is possible that he may lose the right of restraining the

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way; but for one case where the evidence has been lost, and would be supplied by this decision, there will be a thousand cases where a restriction will be created that did not exist in the original grant. I fear these rights of way will be very much narrowed, if they are to be confined to such actual use of them as can be proved. The manner of using a way may vary from time to time. I think the proof of driving hogs is an important circumstance, and very strong evidence of a grant of way for cattle. According to the doctrine contended for, it would be necessary to drive every species of cattle in order to preserve the right of passing with that species. If a man had a little field where cows had not usually been pastured, it would be monstrous that he therefore should not drive his cow to it. Suppose any new species of cattle is introduced into the country, shall the grantees of private ways have no passage for them to their lands? Is it contended, for instance, that no ancient private way in the kingdom can be used for Spanish sheep? Much of the argument has been built upon these being horned cattle. Many breeds of kine have no horns, may the grantee drive those? As to the argument that the inconvenience of such an use amounts to a nuisance, nothing of that sort appears. The grantee has constantly driven all the carriages and all the cattle that he had. This is a claim by prescription, which imports great antiquity, and it does not appear how wide the way was at the time of the original grant, and how much the houses have encroached on it long since, but those encroachments cannot deprive the grantee of his ancient right of way."

One kind of  
right of way  
does not of  
necessity in-  
clude another  
kind.

Can proof of  
one right be  
evidence of  
another?

Assuming this case to have been properly decided, it would appear that, in the English law, a right of way of any one kind does not of necessity include any other kind. Supposing the question to arise upon the record, a plea of a right of way to drive carts or carriages would be no answer to an alleged trespass in riding on horseback across a man's land: or, if pleas were framed strictly in accordance with the facts in *Ballard v. Dyson*, a plea of a right of passage for carts would be no justification to a trespass committed by driving cattle. Assuming this to be correct, a further question of considerable difficulty arises, "whether proof of the user of any one kind of way may be evidence of a right of any other kind"; or whether, to use the words of Chambre, J., in *Ballard v. Dyson*, "it would be necessary to drive every species of cattle in order to preserve the right of passing with that species."

On the authority of the case of *Ballard v. Dyson*, proof of one right cannot afford more than presumptive evidence of another of equal or inferior degree, even if it go to that length, and evidence would be admissible of circumstances rebutting such presumption, such as in that case was given of facts showing the improbability of a grant for the passage of horned cattle along the road in question; and supposing that it does amount to this presumption, it must follow, that the onus probandi of showing the restriction will lie upon the party seeking to rebut the presumption. But in practice it is hardly to be expected that the question will ever be raised by the mere naked proof of a right of superior degree; as it is probable, that in proving the more extended right, the whole of the facts connected with the case would be given in evidence, some of which, as in *Ballard v. Dyson*, may afford grounds for a verdict of the jury finding the restricted right.

Extent of right a question for the jury.

Can proof of one right be evidence of another?

Mr. Justice Heath and Mr. Justice Lawrence were, as has already been seen, of opinion, that proof of use of a cart may afford no evidence of a way for cattle. The former, indeed, lays it down, that "a carriage-way includes a horse-way, but not a drift-way"; while the latter seems to have proceeded on the general ground that, a grant not being shown, the extent of the right could only be shown from the use, from which he inferred, that proof of a use of a carriage-way and of a way for pigs afforded no evidence of a way for horned cattle.

Supposing such qualifying circumstances to appear in evidence on either side, it would be a question for the jury to say, whether the presumption of law, as to the superior including the equal and inferior class of easements, was rebutted by the evidence laid before them. With reference to this question, it might be important to show what had been the conduct of the parties in modern times: even modern user of the right claimed, if unobjected to, though not of itself sufficient to confer the right, would be obviously corroborative of the presumption of law.

It has, however, been seen, that in the civil law the superior class of easements comprehended the inferior (*p*); and unless the authority of Lord Coke as to the classification above given is to be altogether repudiated, it seems impossible not to admit a similar rule into the English law, at least to the extent of raising

*Semble.* Proof of higher right presumptive evidence of right of equal or inferior degree.

(*p*) Ante, 346. Julianus refert cum qui actum stipulatus postea iter stipulatur, posteriore stipulatione nihil

agere; sicuti qui decem deinde quinque stipulatur.—Vinnius, lib. 2, tit. 3, de serv. rust. 4.

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a presumption that an easement of the superior class includes those of an equal or inferior degree, until the inference is rebutted by evidence: those of an equal degree, because the proof of one right is evidence of the whole class to which it belongs; those of an inferior, as naturally comprised in the more extensive right.

Upon the general principle, that every easement is a restriction of the rights of property of the party over whose lands it is exercised, the real question appears to be, under the peculiar facts of each case, whether proof of a right has been given co-extensive with that amount of inconvenience sought to be imposed by the right claimed. Upon this doctrine the classification of rights of way appears to depend, which assumes that the rights of each class impose an equal amount of inconvenience on the property subject to them. It is obvious that, in some cases, a right to drive cattle might be productive of greater inconvenience than a right to drive carts, and vice versâ. It will, therefore, be for the jury to infer the extent of the supposed grant from the actual amount of injury proved under all circumstances attending it. If it appeared that the way had been used for all the purposes required by the claimant, there would be strong evidence of a general right; while, on the other hand, proof that the party, having occasion for a particular way, had not made use of the way in question, would be almost conclusive evidence that he had not a right of way for that particular purpose.

*Cowling v.  
Higginson.*

This doctrine is supported by the case of *Cowling v. Higginson* (q), which was an action of trespass; which the defendant justified under a plea of right of way for horses, carts, waggons, and carriages. It was held, that proof of user for farming purposes did not necessarily prove a right of way for the purpose of conveying coal, the produce of a mine lying under the defendant's land.

In the course of the argument, Lord Abinger observed, "The extent of the right must depend upon the circumstances. If a road led through a park, the jury might naturally infer the right to be limited; but if it went over a common, they might infer a right for all purposes. Using a road as a footpath would not prove a general right, nor proof that a party had used a road to go to church only. Some analogy should be shown between farming and mining purposes." And Parke, B., said: "If it had

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(q) (1838), 4 M. & W. 245.

been shown, that from time immemorial it had been used as a way for all purposes that were required, would not that be evidence of a general right of way? If they show that they have used it time out of mind for all the purposes that they wanted, it would seem to me to give them a general right. You must generalize to some extent. If your argument is to be taken strictly, it must be confined to the identical carriages that have previously been used upon the road, and would not warrant even the slightest alteration in the carriage or the loading, or the purpose for which it was used."

Parke, B., in his judgment, said: "To make out this plea, it is necessary to show an enjoyment of the way generally *as of right*, for the period during which the plea states it to have been used; he must have used it for all purposes *as of right*; and such user, for all purposes for which it was wanted, would be evidence to go to the jury of a general right. Under a plea of prescription of a way, it was necessary to show a user of it for all purposes time out of mind, according to the usual terms in which such a plea is pleaded. If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right. In this particular case, I think the user is evidence to go to the jury that the defendant had a right to a way for all purposes for twenty years. As to the *effect* of such evidence, it is unnecessary to offer any opinion. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all. You must generalize to some extent, and whether in the present case to the extent of establishing a right for agricultural purposes only, is a question for the jury."

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right a ques-  
tion for the  
jury.

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Higginson.*

The correctness of this doctrine was also recognized in the case of *Higham v. Rabett* (*r*); in which it was held by the Court of Common Pleas, that a finding by the jury of a right of way for the purpose of carting timber, did not support a plea of a right of way for all carts, carriages, horses, and on foot, or even amount to a proof of any one of those rights taken separately, so as to admit

*Higham v.  
Rabett.*

(*r*) (1839), 5 Bing. N. C. 622; S. C., 7 Scott, 827. [Cf. *Dare v. Heathcote* (1856), 25 L. J. N. S. Exch. 245, affirmed in error, 36 L. J. Ex. 164; *Hollins v. Verney* (1884), L. R. 13 Q. B. Div. 304, where it was also held that an easement so discontinuous did not fall within the Prescription Act at all.]

Extent of  
right a ques-  
tion for the  
jury.

*Wimbledon  
Conservators  
v. Dixon.*

of the verdict being entered distributively on the issue joined on the plea.

[In *Wimbledon and Putney Commons Conservators v. Dixon* (s), where the user proved was a user for farming purposes only,—except for two or three slight circumstances, the enlargement of a farm-house, the replacing of a mud cottage by a brick cottage, and apparently the taking away of gravel,—the Court declined to presume a grant of a way for all purposes, and an injunction against carting building materials was granted. The Lords Justices, affirming Jessel, M. R., held that the property could not be so changed as substantially to increase or alter the burden upon the servient tenement; and Mellish, L. J., expressed an opinion that Baron Parke, when giving judgment in *Cowling v. Higginson* (t), had not present to his mind the question of a change in the dominant tenement. He preferred the language of Lord Abinger.

*Bradburn v.  
Morris.*

To the same effect is *Bradburn v. Morris* (u), where it was held that a user for twenty years of a way to a field for agricultural purposes did not give a right of way for mineral purposes, no minerals having ever been got upon the land in question.

*Milner's Safe  
Co., Ltd. v.  
Great Northern  
and City  
Railway.*

In *Milner's Safe Co., Ltd. v. Great Northern and City Railway* (x), the question arose as to the extent of a way to be implied over a common passage which ran along the backs of certain freehold houses into a side street. These houses had passed under the will of a testator to various devisees, but the will contained no express provision as to any rights of way over the passage. The plaintiffs were the owners of two of these houses, deriving title under one set of limitations in the will, and the defendants were the owners of the site of two other of the houses, deriving title under another set of limitations in the will. The defendants pulled down the two houses standing on their land and constructed an underground railway station, having one of its entrances opening into the passage, and the question of the extent of the right of way was raised in an action to restrain the use of the passage by the defendants as a thoroughfare for their passengers to or from the railway station.

(s) (1875), L. R. 1 Ch. Div. 362. Cf. the dicta in *Williams v. James* (1867), L. R. 2 C. P. 577; and of North, J., in *Mayor of New Windsor v. Stovell* (1884),

27 C. D. 665, at p. 672.

(t) Above, p. 354.

(u) (1876), L. R. 3 Ch. Div. 812.

(x) [1907] 1 Ch. 208.

[Kekewich, J., after dealing with the evidence as to user at the dates of the will and of the death of the testator, and also in later years, and coming to the conclusion that the user had throughout been for domestic and ordinary business purposes, held that the defendants' right of way over the passage extended only to user for those purposes, and that the right claimed by the defendants was in excess of what they were entitled to.

Extent of right a question for the jury.

*Milner's Safe Co., Ltd. v. Great Northern and City Railway.*

And so, where the way is of necessity, the extent of user acquired is limited by the necessity existing at the time of the implied grant (*y*), or created by the purpose for which the conveyance is taken (*z*).

It is a more difficult question how far a right of way expressly granted or reserved is limited by the nature or the user of the tenement to which it is annexed (*a*). On the one hand, it is said that the grantor looks only to the actual user of the dominant tenement, and that to alter the user is to increase the burden of the easement. On the other hand, it is argued that, if it were intended to limit the grant, this would be done in express words; that a grant must be construed against the grantor; and that a grant in terms general must not be shackled by implied restrictions.

Express grant or reservation, how limited.

The question is often complicated by the terms in which the dominant tenement is described in the grant; the purposes to which the tenement is put being referred to, a limitation of the grant is inferred from this reference.

The cases are conflicting, and it may be well to examine them in historical order.

In *Allan v. Gomme* (*b*), in trespass quare clausum fregit, it appeared that the defendant Gomme, having by express reservation a right of way over the plaintiff's premises to a stable and loft on his own land, and to a "space or opening under the said loft and then used as a wood-house," converted the loft and the space thereunder into a cottage, and claimed to use the way as appurtenant to the cottage. A verdict having been found for the

*Allan v. Gomme.*

(*y*) *Corporation of London v. Riggs* (1880), L. R. 13 Ch. D. 798.

(*z*) *Serff v. Acton Local Board* (1886), L. R. 31 Ch. D. 679.

(*a*) The question discussed here is purely one of construction. The case of "excess" in the user of a way, as where a right of way to one close is

used for the purpose of access to another close lying beyond it and in the possession of the same person, is discussed below, Part IV. Chap. III. A similar question affecting ways of necessity was treated in *Gayford v. Moffat* (1868), L. R. 4 Ch. 133.

(*b*) (1840), 11 A. & E. 759; 52 R. R. 492.



Express  
grant or  
reservation,  
how limited.

*Allan v.  
Gomme.*

[plaintiff, the defendant obtained a rule nisi for a nonsuit, which was discharged by the Exchequer Chamber. The judgment of the Court (c) was delivered by Lord Denman, C. J. His Lordship, while conceding that the words "now used as a wood-house" were to be taken merely as ascertaining the place where the open space of ground was, was of opinion that the defendant was confined to the use of the way "to a place which should be *in the same predicament* as it was at the time of the making the deed. We do not mean to say that he could only use it to make a deposit of wood there, for we consider the words 'now used as a wood-house' merely used for the ascertaining the locality and identity of the place called a space or opening under the loft; and we think he might have the benefit of the way to make a deposit of any articles, or use it in any way he pleased, provided it continued in the state of open ground. But we think he could only use it for purposes which were compatible with the ground being open, and that, if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed. Suppose that this piece of ground, instead of being a small quantity, had been a field of many acres, and that Browne had sold off the part above mentioned to the plaintiff, reserving to himself this right of way to the land, calling it a field then in pasture, or in corn, and had subsequently filled the land with small cottages or had built a factory, or established gas works, it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings."

The Court referred to *Luttrell's Case* (d), and to the cases where an alteration in a building in respect of which lights were claimed had been held to extinguish the easement (e).

*Henning v.  
Burnet.*

The above case was admittedly one of first impression; and in *Henning v. Burnet* (f), Parke, B., considered that the rule had been laid down too strictly. "No doubt," he added, "if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered."

(c) Lord Denman, C. J., and Littledale and Coleridge, JJ.

(d) (1738), 4 Rep. 86 a.

(e) Treated below, Part V. Chap. II.

(f) (1852), 8 Exch. 187, 192; 91 R. R. 427.

[In *South Metropolitan Cemetery Co. v. Eden* (g), Jervis, C. J., made a similar distinction. "If I grant a man a way to a cottage which consists of one room, I know the extent of the liberty I grant; and my grant would not justify the grantee in claiming to use the way to gain access to a town he might build at the extremity of it. Here the grant is general,—to use the road for the purpose of going to or returning from the land conveyed or any part thereof; it is not defined, as in the case referred to."

Express  
grant or  
reservation,  
how limited.

*South  
Metropolitan  
Cemetery Co.  
v. Eden.*

These dicta, however, leave open the question whether the purpose of the grant can be inferred from the actual condition of the dominant tenement, or from its user as described in the grant, or must be specified in the grant itself.

*Williams v. James* (h) was a case of prescription, and therefore no authority on the point now being discussed. But Willes, J., in giving judgment, said that the distinction between a grant and prescription was obvious. "In the case of proving a right by prescription the user of the right is the only evidence. In the case of a grant the language of the instrument can be referred to, and it is of course for the Court to construe that language; and in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against the grantor must be applied."

*Williams v.  
James.*

In *Watts v. Kelson* (i), it appeared that the plaintiff was, by express words contained in the conveyance of his premises, entitled to "a right of way" through the defendant's gateway and close "to a wicket-gate to be erected by the said C. Watts (the plaintiff) leading into the hereinbefore described piece or part of garden ground." The plaintiff's premises contained, besides the garden, a cottage residence, a large number of stalls for feeding cattle, a yard and outbuildings, and a few acres of land. The defendant's gate would admit carriages. The plaintiff did not erect a wicket-gate, but erected a cart-shed on the same spot, and brought carts to it. The defendant having obstructed the way, Lord Romilly, M. R., granted an injunction. The defendant contended that the way was granted for so long only as the part of the plaintiff's premises nearest to the proposed wicket-gate should continue to be used as a garden, quoting *Allan v. Gomme* and the other cases; but Lord

*Watts v.  
Kelson.*

(g) (1855), 16 C. B. 42, 57.

(h) (1867), L. R. 2 C. P. 577, 581.

(i) (1870), L. R. 6 Ch. 166.

Express  
grant or  
reservation,  
how limited.

*Watts v.  
Kelson.*

*Wood v.  
Saunders.*

[Romilly, without giving reasons, overruled this contention. The case seems to be consistent with either solution of the point now under discussion, as the requirements, not only of the garden, but of the other portions of the plaintiff's premises, might properly be considered.

In *Wood v. Saunders* (*k*), the plaintiff, being entitled by express grant to a mansion with the free passage of water and soil into and to a cesspool on the defendant's land, enlarged the mansion so as to increase the amount of soil flowing from it. The defendant having stopped the drains leading to the cesspool, the case came before V.-C. Hall, who restrained the defendant from preventing the free use and passage of water and soil in and to the cesspool, but added that his order was only to protect the plaintiff in the reasonable use of such cesspool to the extent to which the same was used prior to the date of the grant. On appeal, however, the decree was varied, the plaintiff submitting to be restrained from allowing the drainage from the additional buildings erected by him to go into the cesspool, and the defendant being restrained from preventing the free passage of water and soil into the cesspool. The Court apparently treated the drainage from the additional buildings as severable from the drainage from the original building; and thus the case became a question of "excess" rather than of construction (*l*).

*United Land  
Co. v.  
G. E. Rail. Co.*

In *United Land Company v. Great Eastern Railway Company* (*m*), it appeared that a railway company had, by a private Act, been empowered to make a railway through certain lands belonging to the Crown. The Act required the company to make such convenient crossings across, over, or under the railway, where it traversed the Crown lands, as should, in the judgment of the Commissioners of Lands and Forests, be "necessary for the convenient enjoyment and occupation of the lands"; and, in accordance with this provision, the company agreed with the Commissioners to make "four level crossings" at certain specific points, "with proper approaches thereto from the lands on the other side," three of the crossings to be thirty feet wide each, and the remaining one twenty feet wide. The crossings were made substantially in accordance with this agreement. The land in question was, at the date of the Act, marsh or pasture land, and was subject to a

(*k*) (1875), L. R. 10 Ch. 582.

(*l*) See above, p. 357, note (*a*).

(*m*) (1873), L. R. 17 Eq. 158; (1875), 10 Ch. 586.

[statute which prevented private buildings from being built upon it; but, the land having subsequently been sold free from this restriction and advertised for re-sale in building lots, the defendants, being successors in title of the original railway company, objected to the level crossings being used for the purpose of access to the houses to be erected. The objection was overruled by V.-C. Malins, who, while apparently disapproving of *Allan v. Gomme*, distinguished the case before him from the grant of a private right of way on the ground that it was a case of compulsory sale, and that a railway company dividing land into lots was bound to render it as useful for all purposes as if no severance had been made. He thought that the width of the crossings showed that they had not been intended to be used merely for agricultural purposes. The nature of the communications agreed upon had no doubt reduced the amount of compensation paid (n).]

Express  
grant or  
reservation,  
how limited.  
*United Land  
Co. v.  
G. E. Rail. Co.*

On appeal, the Lords Justices James and Mellish affirmed this decision, chiefly for the special reasons given by the Vice-Chancellor. But Lord Justice Mellish added some words on the general principle. "No doubt," he said, "there are authorities that, from the description of the lands to which the right of way is annexed and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes; but, if there is no limit in the grant, the way may be used for all purposes."

These words are difficult to reconcile with *Allan v. Gomme*, although the decision itself appears to be distinguishable. In fact, both decisions rest on the same principle, that, in construing a grant, all the circumstances may be looked at for the purpose of arriving at the intention of the parties.

It is remarkable that in *Newcomen v. Coulson* (o), which was a very similar case to the *United Land Co.'s Case*, Malins, V.-C., expressly recognized *Allan v. Gomme* as binding. An award under an Inclosure Act directed that each of the allottees, "and the owner and owners for the time being of the lands hereby to them respectively allotted, shall for ever hereafter have and enjoy a way-right and liberty of passage for themselves and their respective tenants and farmers of the said lands and grounds, as well on foot as on horseback, and with their carts and carriages, and to

(n) *Ct. Reg. v. Brown* (1867), L. R. 2 Q. B. 630.  
(o) (1876), L. R. 5 Ch. Div. 133.

Express  
grant or  
reservation,  
how limited.

*Newcomen v.  
Coulson.*

[lead and drive their horses, oxen, and other cattle, as often as occasion shall require," over a certain property therein specified; and that, if the allottees or any of them, or any of the owners for the time being of their respective allotments, should "street out" the way, it should be made eleven yards broad at the least between the quick-sets. The allotments were merely agricultural land. The owners of one of the allotments having commenced to build upon their land a number of villa residences, and to metal the road for the purpose of being used with the residences, the owner of the soil of the road and of the adjoining property interfered, and insisted that the way could not be used except for access to agricultural property. His action, and the appeal, were dismissed. Malins, V.-C., distinguished *Allan v. Gomme*, being of opinion that this was not the case of an easement, but of an arrangement between the owners of the land enclosed for the formation and enjoyment of a way, which meant a way for all purposes; but the appeal judges repudiated this distinction, and apparently relied on the fact that the way was granted as appurtenant to "land," which meant the land and all buildings from time to time to be erected upon it. In this view the decision in *Allan v. Gomme* would turn simply on the description of the dominant tenement as a "space or opening." The general principle of that case is not explicitly discussed.

*Cannon v.  
Villars.*

In *Cannon v. Villars* (*p*) the defendant had agreed to let to the plaintiff a house and a piece of vacant ground for the building of a workshop to be used by the plaintiff in his business of a gas engineer, and the right of "ingress and egress" over a paved yard in front of the house. The yard having been blocked up by the defendant's vans, so that no vehicles could reach the plaintiff's house, the plaintiff brought this action. The defendant alleged that the plaintiff had nothing more than a right of footway; but Jessel, M. R., overruled this contention. "Primâ facie," he said, "the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted, and the purpose for which it is intended to be used; and both these circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot-passengers, or restricted to foot-passengers and horsemen

[or cattle, which is generally called a drift-way, or a general right of way for carts, horses, carriages, and everything else.]

Express  
grant or  
reservation,  
how limited.

His lordship then applied this reasoning to the case before him, and, having referred to the permission to build on the vacant land, the nature of the plaintiff's business, and the width and character of the way, granted the injunction claimed.

*Cannon v.  
Villars.*

*Finch v. Great Western Rail. Co. (q)* was another case of award under an Inclosure Act; but here the way in question (twenty feet wide) was to "remain a private carriage-road and drift-way for the use of the respective owners and occupiers for the time being of the allotment over which the same passes, and of several old inclosed meadows and woodlands belonging to [A.], a meadow called Broadmead belonging to [B.]; and the said inclosed meadow belonging to [C.] to which the same passes." A part of the "allotment over which the" road "passed," which had been pasture land, was converted by the defendant company into a cattle-pen for storing cattle in transit, the user of the road being much increased: and, an action having been brought, a Divisional Court of the Queen's Bench Division (*r*) held that the new user could be justified. The Court thought that *Allan v. Gomme* established no general principle, but turned on the construction of the particular deed referred to; and that the *United Land Co.'s Case* and *Neucomen v. Coulson* "established the principle that, where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant." But at the same time, their lordships pointed out that the case before them was not the case of a grant, but of an award under an Inclosure Act; and they appeared to rely to some extent on this distinction.

*Finch v.  
G. W. R.*

In *Great Western Railway v. Talbot (s)*, *Allan v. Gomme* was not referred to either in argument or in the judgment, but the decision was to the same effect as the decision in that case, namely, that the extent of the right of way was to be measured by the user at or previously to the date of the grant.

*G. W. R. v.  
Talbot.*

The railway company had entered into an agreement that they would construct and maintain, "for the accommodation of the

(q) (1879), L. R. 5 Ex. D. 254.

(r) Kelly, C. B., and Stephen, J.  
(s) [1902] 2 Ch. 759.

Express  
grant or  
reservation,  
how limited.

*G. W. R. v.  
Talbot.*

[owners and occupiers for the time being of the lands adjoining the railway," amongst other works, a level crossing for a tramway which was crossed on the level by the railway company's line.

At the date of the agreement the owner of the tramway had used it for conveying goods and traffic from his land to a neighbouring port. He had also allowed coals to be conveyed along the tramway to the port from a colliery not situate on his land. His successor in title afterwards claimed to be entitled to convey over the level crossing, by means of the tramway, goods and traffic brought on to her land from other places, whether situate on her estate or not. Her right to do so being called in question, the extent of the right of way conferred upon her came eventually before the Court of Appeal, with the result that a declaration was made to the effect that she was not entitled to use the level crossing for the purpose of conveying goods and traffic so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent, as enjoyed at or previous to the date of the agreement, or as since enjoyed, if, owing to acquiescence or otherwise, such subsequent enjoyment was then binding on the railway company; but it was expressly declared that she was entitled to continue to bring goods from the above-mentioned colliery across the level crossing, in the same manner as the same were brought at or previous to the date of the agreement.

The judgment of the Court proceeded upon the ground of the intention of the parties at the time when the works were executed.

After discussing the defendant's claim to the right to use the level crossing for conveying goods and traffic brought on to her land from all places, whether or not situate on her estate, Stirling, L. J., who delivered the judgment of the Court, observed, "Such a user, in our opinion, goes far beyond anything which could have been in the contemplation of anyone when the works were made;" and he expressly stated that this conclusion did not appear to the Court to be in conflict with the decision in *United Land Co. v. Great Eastern Rail. Co. (t)*, which, he explained, turned on the provisions of a very special enactment.

It may be mentioned that in the Court of first instance the decision was in favour of the defendant, on the ground that, there being nothing in the agreement to limit the user, there was no

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(t) See above, p. 360.

[reason why she should not use the crossing for any purpose she pleased, provided that the user must not interfere with the traffic of the Great Western Railway Co.

Express  
grant or  
reservation,  
how limited.

*Harris v.  
Flower.*

In *Harris v. Flower & Sons* (u) the question involved was a claim to use a right of way for the purpose of access to buildings part of which was erected upon land to which the right of way was not appurtenant. This question was treated in the Court of first instance as being governed by the decisions in *United Land Co. v. Great Eastern Rail. Co.* (x), *Newcomen v. Coulson* (y), and *Finch v. Great Western Railway* (z), and it was held that, the user being bonâ fide for the purpose of access to the land to which the right of way was appurtenant, and none the less so because a portion of the building erected on that land extended beyond its boundary, the user was authorized. But this decision was reversed by the Court of Appeal, where the question was treated as being governed by the decisions with regard to excessive user discussed later (a), and the case would appear more properly to call for consideration in connection with those decisions.

Upon the whole it cannot be said that the decision in *Allan v. Gomme* has established any general principle. The nature of the road over which the way is granted, and of the dominant and servient tenements, the user (if any) to which the way has been subject previously to the grant, the purpose for which it is intended to be used or which might reasonably be in the contemplation of the parties, and all the surrounding circumstances must receive consideration; and each case must be judged upon its circumstances (b).

Conclusion.

Probably the true view is] *that there is no positive division of rights of way into distinct classes.* Where the extent of the right is to be inferred from user, it is for the jury, [or, in the absence of a jury, the Court exercising the functions of a jury,] to say, under all the circumstances attendant upon the user, *what is the right*; and where the right is conferred by deed, the deed itself must be looked to for the same purpose. Indeed, in the civil law, from which the earlier writers have adopted their technical terms, it would appear there was no rigorous classification of rights of way,

General rule  
as to extent  
of right.

(u) (1904), 90 L. T. 669; 20 T. L. R. 501; on appeal, 74 L. J. Ch. 127; 91 L. T. 816; 21 T. L. R. 13.

(x) Above, p. 360.

(y) Above, p. 361.

(z) Above, p. 363.

(a) Post, Part IV., Chap. III.

(b) See *Sketchley v. Berger* (1894), 69 L. T. 754. *Midland Rail. Co. v. Gribble*, [1895] 2 Ch. 827, is a case of abandonment.



General rule  
as to extent  
of right.

unless the very terms "iter, actus or via," to which a particular meaning was attached, were adopted. The qualifications of ways seem to have been as numerous as in the English law, ex. gr. what kind of vehicle should be used or prohibited; that the way should only be used with a horse, or that a fixed weight or a particular commodity only should be conveyed, &c. So also it might be granted to be enjoyed only at certain days or hours (c).

Special cases  
of construc-  
tion.

[It remains to notice a few cases in which particular grants have been construed by the courts.]

*Brunton v.*  
*Hall.*

In *Brunton v. Hall* (d), it was held that a reservation in a lease of a right of way on foot, and for horses, oxen, cattle, and sheep, did not give any right of way to lead manure.

It was contended also, on behalf of the plaintiff, that "to lead manure" might mean nothing more than to carry manure, and that if he had a right of way, he might, in the exercise of it, carry burdens. The authorities, however, seem to be much against the proposition, that a right of passage would in general give a right to transport burdens in the several modes in which the right of way might be exercised (e).

It is true that, according to the civil law, a man having the right termed "iter," which was a right to pass on horseback as well as on foot, might be carried in a litter; but he could not drive a beast of burden along it. So the right termed "actus," which was a right of passage for beasts of burden and carriages, gave no right to pass with waggons. "Qui sella aut lectica vehitur ire non agere dicitur. Jumentum vero ducere non potest, qui iter tantum habet. Qui actum habet, et plaustrum ducere, et jumenta agere potest. Sed trahendi lapidem aut tignum, neutri eorum jus est" (f).

It is obvious that to hold that a right of way per se gave a right to carry burdens would impose a much more onerous obliga-

(c) Modum adjici servitutibus posse constat; veluti quo genere vehiculi agatur, vel non agatur, veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex ille transducatur, aut carbo portetur—Dig. 8, 1, 4, § 1, De serv. Usus servitutum temporibus secerni potest: forte, ut quis post horam tertiam usque in horam decimam eo jure utatur, vel, ut alternis diebus utatur.—Ibid. 5, § 1.

(d) (1841), 1 Q. B. 792; 1 Gale & Dav. 207. See also *Durham and Sunderland Rail. Co. v. Walker* (1842), 2 Q. B. 963, as

to the use of a railway for other purposes than those for which it was granted.

(e) See *Ballard v. Dyson* (1808), 1 Taunt. 279; 9 R. R. 770; *Higham v. Rabitt* (1839), 7 Scott, 827; and particularly *Couling v. Higginson* (1838), 4 M. & W. 245; [and *Dare v. Heathcote*, ubi sup. p. 355, n.]

(f) Dig. 8, 3, 7, de serv. præd. rust. Pothier, in a note on the term "plaustrum," says, "Id est currum; non verum plaustrum trahendis oneribus aptum."

tion on the servient owner; for if he wished to build or plant trees on his tenement, he must leave a higher space than he would otherwise be obliged to do. For this reason it was, in the civil law, that the opinion was generally entertained that neither the "iter" nor "actus" gave the right to pass carrying a pole erect. "Quidam nec hastam rectam ei ferre licere; quia neque eundi, neque agendi gratia id faceret, et possunt fructus eo modo lædi" (g).

Special cases  
of  
construction.

[In *Midgley v. Richmond* (h), general words in an Act of Parliament reserving a way-leave to the Bishop of Durham for coals, &c., gotten out of any lands, were restrained by the context to lands belonging to the see.

*Midgley v.  
Richmond.*

In *Wood v. Stourbridge Rail. Co.* (i), a grant of a right of way over a certain road which was partly formed and partly only staked out, was held to extend to the whole road, formed and unformed.

*Wood v. Stour-  
bridge Rail.  
Co.*

In *Mitcalfe v. Westaway* (k), a reservation of a right of way to the "assigns" of the grantor was held to operate in favour of his licensees.

*Mitcalfe v.  
Westaway.*

In *Bazendale v. North Lambeth Liberal and Radical Club, Ltd.* (l), a grant of a right of way to the grantee, "his executors, administrators, and assigns, undertenants and servants," was held to extend to all licensees of the grantee lawfully going to and from the dominant tenement.

*Bazendale v.  
North Lam-  
beth Liberal,  
&c. Club.*

In *Thornton v. Little* (m), the word "visitors" in a grant of a right of way was held to include pupils attending a school carried on upon the dominant tenement.

*Thornton v.  
Little.*

But in *Keith v. Twentieth Century Club* (n), it was held that members of a club, whether resident or not, were not "lessees," or "sub-lessees," or "tenants," or "families," or "friends," of the

*Keith v.  
Twentieth  
Century Club.*

(g) Dig. 8, 3, 7, de serv. præd. rust. Pothier's note on this passage is as follows:—"Quidam jus rectæ hastæ ferendæ quod in servitute viæ contineri dicitur, in servitute actus non item, ita intelligunt; ut in servitute viæ non solum duntaxat ad certam latitudinem, sed etiam cælum serviat intra eam altitudinem quæ hastæ ferendæ par sit; adeo ut is cui servitus debetur, possit plaustrorum suorum onus usque ad hanc altitudinem exaggerare; ille vero qui eam servitutum debet, non possit in loco per quem via debetur, infra hanc altitudinem

quidquam habere; puta deambulationes arboribus opacas, quæ servituti nocerent. Ita Maranus ad h. tit."

(h) (1845), 14 M. & W. 595; confirmed by *Hedley v. Fenwick* (1864), 3 H. & C. 349. Dist. *Chadwick v. Marsden* (1867), L. R. 2 Exch. 285; *Ardley v. Guardians of St. Pancras* (1870), 39 L. J. Ch. 871.

(i) (1864), 16 C. B. N. S. 222.

(k) (1864), 34 L. J. C. P. 113.

(l) [1902] 2 Ch. 427.

(m) (1907), W. N. 68.

(n) (1904), 73 L. J. Ch. 545; 90 L. T. 775; 52 W. R. 554.

Special cases  
of  
construction.

*Reynolds v.  
Moore.*

[defendants, within the meaning of a grant of the use of a garden containing those words.

And in *Reynolds v. Moore* (o), it was held that a reservation of "free liberty" to the grantor, "his heirs and assigns, and his and their attendants, gamekeepers and servants, to hunt, fowl, fish, hawk, and set" in the demised premises, did not authorize the grantor or his assignee to permit a stranger to shoot, in the absence of the grantor or his assignee.

*Selby v.  
Crystal Palace  
District Gas  
Co.*

In *Selby v. Crystal Palace District Gas Co.* (p), it was held that a covenant that the owners and occupiers of lands conveyed should have the full use and enjoyment of all roads "in as full, free, complete, and absolute a manner to all intents and purposes whatsoever as if the same were public roads," entitled them, not only to the use of the roads for the purpose of transit or for the purposes for which public roads could be used at the date of the deed, but also to rights subsequently granted over public roads, as to open them for the purpose of conveying gas to the houses of the occupiers.

*Scots Mines  
Co. v. Lead-  
hills Mines Co.*

In *Scots Mines Co. v. Leadhills Mines Co.* (q), both parties held mines under the Earl of Hopetoun. There was a reservation in the plaintiffs' lease to the earl and his tenants of the use of all shafts, sumpts, cuts, levels, drifts, and other way gates made or to be made, with power of sinking and driving within the plaintiffs' grounds for the convenience of his other works, in so far as the same could be done without incommoding the plaintiffs, the earl repairing all damages. It was held that the plaintiffs were under a servitude to receive all water conveyed in the ordinary course of mining by the defendants, and that the words "without incommoding," &c., did not limit the use of the shaft in working the old mines, but were confined to the new works, being the last antecedent. Lord Campbell said: "The occupiers of the mines on the higher level are only empowered to do within their own limits what might be done prudently in the ordinary course of mining; they certainly would not be justified in incautiously tapping a tarn, and so inundating the country below."

*N. E. Rail. Co.  
v. Hastings.*

In *The North-Eastern Rail. Co. v. Lord Hastings* (r) a specified rent payable by the railway company was reserved to H. on coal

(o) [1898] 2 Ir. R. 641.  
(p) (1862), 30 Beav. 606; 8 Jur. N. S.  
422, 830; 31 L. J. Ch. 595.

(q) (1859), 34 L. T. 34.  
(r) [1900] A. C. 260; affirming  
[1899] 1 Ch. 656.

[carried over any part of certain railways which should be shipped at Port B. For more than forty years rent was paid for coal carried over the railways and shipped at Port B., when the coal passed over H.'s land, but no rent was paid when it did not pass over H.'s land.] Special cases  
of  
construction.  
*N. E. Rail. Co.*  
*v. Hastings.*

In an action by H.'s successor in title against the railway company it was held that the company were liable to pay the rent upon coal carried over any part of the railways, although it did not pass over H.'s land; and that the construction could not be affected by the fact that the parties had interpreted the words in a sense different from that which the words plainly bore.

In *Cousens v. Rose* (*s*), Lord Romilly held that a grant of "the free liberty and right of way and passage, and of ingress, egress, and regress to and for" the lessees and the survivor of them, "their and his workmen and servants, and all and any other persons and person by their or his permission," over a "roadway and passage," carried a right of way for foot-passengers only. *Cousens v.*  
*Rose.*

In *Collins v. Slade* (*t*), the construction of a right of way turned on the words "as used and enjoyed by William Slade." *Collins v.*  
*Slade.*

In *Knox v. Sansom* (*u*), a grant of a right of way for carts and carriages over a piece of land coloured green on a plan was held, partly on the construction of the grant and partly on evidence of user, to extend over the whole of the land coloured green. *Knox v.*  
*Sansom.*

In *Randall v. Hall* (*x*) property was sold by auction in sixty lots, the particulars and conditions referring to a plan, upon which a number of roads were marked out so as to provide frontages for all the lots. A purchaser of two lots at the auction sale claimed rights of way over all the roads shown on the plan, but it was held that he was entitled only to a right of way over the road adjoining his lots and leading directly to the public highway. *Randall v.*  
*Hall.*

In *Cowen v. Truefitt, Ltd.* (*y*) a lease of rooms on the second floor of two adjoining houses, numbered 13 and 14, was granted, together with free ingress and egress for the lessee "through the staircase and passages of No. 13;" there was no staircase in No. 13 leading to the premises demised, but there was such a staircase in No. 14. It was held that the lessee was *Cowen v.*  
*Truefitt, Ltd.*

(*s*) (1871), L. R. 12 Eq. 366.

(*t*) (1874), 23 W. R. 199.

(*u*) (1877), 25 W. R. 864.

(*x*) (1851), 4 De G. & Sm. 343; 87 R. R. 402.

(*y*) [1898] 2 Ch. 551; on appeal, [1899] 2 Ch. 309.

Special cases  
of  
construction.

[entitled to the use of the staircase in No. 14, in the Court of first instance on the ground that the words "of No. 13" might be rejected as *falsa demonstratio*; and by the Court of Appeal on the ground of common mistake and the intention of the parties.

*Strick v. City  
Offices.*

In *Strick & Co., Ltd. v. City Offices Co., Ltd.* (z) the defendants granted to the plaintiffs a lease of a set of offices in a block of buildings. No mention was made in the lease of any right of access from the entrance hall, but it was admitted that the plaintiffs had such right. At the date of the lease the entrance hall was of large dimensions, and the defendants subsequently proposed to alter the building so as to diminish the size of the entrance hall. The plaintiffs claimed a right of way over every part of the entrance hall. It was held that no such right existed, the plaintiffs being entitled only to a reasonable user.

*Metropolitan  
Rail. Co. v.  
Fowler.*

In *Metropolitan Rail. Co. v. Fowler* (a) it was held that upon the true construction of the railway company's special Act of Parliament a tunnel was a "hereditament" within the meaning of 38 Geo. III. c. 5, s. 4, and not a bare easement, and was therefore chargeable with land tax.

*Deacon v.  
S. E. Rail. Co.*

In *Deacon v. South-Eastern Rail. Co.* (b), it was held that a grantor of a right of way, having once defined the direction of the way, could not alter it.

*Reilly v.  
Booth.*

In *Reilly v. Booth* (c), where a house had been granted, together with the "exclusive use" of a gateway connecting the house with the public street, the gateway being described by height, length, and width, it was held that the grantee was not confined to using the gateway as a means of access to the premises in the rear, but could use it for all lawful purposes, including match-boarding the ceiling, and fixing a bookstall in the passage.

*Cooke v.  
Ingram.*

In *Cooke v. Ingram* (d), where a right of way from "every part" of a piece of land over a certain road had been granted, it was held that the grantee could cross from any point in his land to the road over an intervening strip belonging to the grantor, and that this right had not been abandoned by the use of one mode of access only.

**Termini.**

A right of way should, generally speaking, have a terminus a quo and a terminus ad quem, so as to be bounded and circum-

(z) (1906), 22 T. L. R. 667.

(a) [1893] A. C. 416.

(b) W. N. (1889), p. 79.

(c) (1890), L. R. 44 Ch. Div. 12.

*Dist. London Taverns Co. v. Worley* (1888), 44 Ch. Div. 24, where "the exclusive right of gateway" was granted.

(d) (1893), 68 L. T. 671.

Special cases  
of  
construction.

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[scribed to a place certain (e) ; but in *Wimbledon and Putney Commons Conservators v. Dixon* (f), the Lords Justices were of opinion that the fact that the occupiers of a tenement to which a way by user was claimed had used, not a definite road marked out between the termini, but a number of tracks indifferently, did not prevent the right from being acquired.

In *Metropolitan Rail. Co. v. Great Western Rail. Co.* (g) a lessor had in 1878 leased to the plaintiff company certain land, together with a right of way through a circular road over the defendant company's land. The way was not definitely described, and was never in fact used by the plaintiff company. It was held that the plaintiff company could not maintain an action to enforce the right of way, chiefly on the ground that the event upon which the right of way was to come into operation had not happened, but the Court expressed an opinion that the right claimed was too undefined and unlimited to allow of an action being maintained.]

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(e) *Albon v. Dremsall* (1610), 1 Brownl. 216; Yelv. 163; Com. Dig. Chimin, D. 2; and Wilson, J., in *Rouse v. Bardin* (1790), 1 H. Bl. 355; 37 R. R. 414. In *South Metropolitan Cemetery Co. v. Eden* (1855), 16 C. B. 42, the right was granted to persons coming to the dominant tenement or any part thereof; cf. *Cooke v. Ingram*, ubi sup. In an American case (*Jones v. Percival*, 5 Pick

(Mass.) 485), it was held that a right of way over land in all directions, where most convenient to the dominant owner and least prejudicial to the servient owner, could not be prescribed for, nor could a grant of such a right be presumed. Cf. *Att.-Gen. v. Antrobus*, [1905] 2 Ch. 188.

(f) (1875), L. R. 1 Ch. Div. 362.

(g) (1901), 84 L. T. 333.

## CHAPTER IV.

## RIGHT TO SUPPORT FROM NEIGHBOURING SOIL AND HOUSES.

THE right to support from the adjoining soil may be claimed either in respect of the land in its natural state, or land subjected to an artificial pressure by means of buildings or otherwise.

A further right to support may, likewise, be claimed for one building from the adjoining buildings on either side.

In connection with this subject, a question of considerable importance arises with regard to the degree of care which a party is bound to use in withdrawing support to which no right has been acquired by an easement.

SECT. 1.—*Natural Support to Land.*

Natural support to soil.

If every proprietor of land was at liberty to dig and mine *at pleasure on his own soil*, without considering what effect such excavations must produce upon the land of his neighbours, it is obvious that the withdrawal of the lateral support would, in many cases, cause the falling in of the land adjoining.

A right of property not an easement.

As far as the mere support to the soil is concerned, such support must have been afforded as long as the land itself has been in existence; and in all those cases at least in which the owner of land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, he has a right to the support of it, as an ordinary right of property, not as an easement, as being necessarily and naturally attached to the soil. The negation of this principle would be incompatible with the very security for property, as it is obvious that, if the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone.

Although there [was for some time] no direct decision in support of this doctrine, yet the leaning of the Courts appears to have been in its favour from a very early period: thus, in Rolle's Abridgment (a) it is laid down, "It seems that a man who has land closely adjoining my land, cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie." "It may be true," said Lord Tenterden, in delivering the judgment of the Court of King's Bench in *Wyatt v. Harrison* (b), "that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbour digs in his land, so as to occasion mine to fall in, he may be liable to an action."

Support to  
soil a right of  
property.

[This doctrine was treated, in the judgment of the Court of Queen's Bench in *Humphries v. Brogden*, as one long settled by the law of England (c); and in the last-mentioned case it was decided that the like right of support exists in respect of the adjoining soil, subjacent as well as adjacent, so that if the surface and the subjacent soil be vested in different owners, the owner of the former has the like right as against the latter.

Subjacent  
soil.

But the obligation to support a particular property only binds so much of the adjoining land as is necessary to sustain such property in its natural state; so that no man can sue for damages caused to his property by the excavation of land not immediately adjoining it, if the damage would not have resulted but for the excavation of the intervening land (d).

Intervening  
land  
excavated.

And the natural right does not extend to have the support of any underground water which may be in the soil, so as to prevent the adjoining owner from draining his soil, if for any reason it becomes necessary or convenient for him to do so; the presence of the water in the soil being an accidental circumstance, the continuance of which the landowner has no right to count upon (e);

Support by  
water.

(a) Vol. 2, 564, Trespass, Justification, I. pl. 1. *Wilde v. Minsterley*.

(b) (1832), 3 B. & Ad. 876; 37 R. R. 566.

(c) (1848), 12 Q. B. 739; 76 R. R. 402. See also the judgments of Wood, V.-C., in *Hunt v. Peake* (1860), 1 Johns. 705; 29 L. J. Ch. 787; and in *North-Eastern Rail. Co. v. Elliott* (1860), 2 De G., F. & J. 423; 10 H. L. C. 333; 1 J. & H. 145; *Harris v. Ryding* (1839),

5 M. & W. 60; *Caledonian Rail. Co. v. Sprot*, 2 M'Queen, Sc. Ap. 449; *Bonomi v. Backhouse* (1859), E. B. & E. 655; 9 H. L. C. 503; *Angus v. Dalton* (1878), L. R. 4 Q. B. Div. 167, 184, 191; *Dolton v. Angus* (1881), L. R. 6 App. Cas. 791, 838.

(d) *Corporation of Birmingham v. Allen* (1877), L. R. 6 Ch. D. 284.

(e) Above, p. 293.



Support to  
soil a right of  
property.

Nature of  
the right.

Statutes of  
Limitation.

Buildings.

Easement to  
let down soil.

[but this principle does not apply to a stratum of semi-liquid silt (*f*), nor to pitch or any other liquefying substance (*g*).

These rights of support are not rights to have the whole or any part of the adjacent or subjacent soil left in its natural state, but simply a right not to have the land injured by anything done, however carefully, in the adjoining soil subjacent or adjacent (*h*). Consequently, until some actual damage is caused to the land by the withdrawal of the adjoining soil, no cause of action arises (*i*), and the Statute of Limitations does not begin to run (*j*); and, where there are successive subsidences arising from one digging, the statute runs from each subsidence as a separate cause of action (*k*).

Even if the pressure upon the adjoining soil has been increased by buildings, however modern, on the surface, still an action will lie if the soil sinks not on account of this additional pressure, but on account of the operations in the adjoining soil, and would have sunk if there had been no buildings thereon (*l*).

This natural right of support for the soil, unencumbered by buildings, is one which *prima facie* exists in all cases as between the owner of the land and his neighbour, whether adjacent or subjacent; but that neighbour may, in some cases, enjoy the right to work in the adjacent or subjacent soil, so as to cause subsidence (*m*). Such a right is an easement (analogous to a right of way), and may be created either upon the original severance of the land between two owners (whether by an ordinary conveyance or by

(*f*) *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; affirming the decision of North, J., [1898] 2 Ch. 614.

(*g*) *Trinidad Asphalt Co. v. Ambard*, [1899] A. C. 594.

(*h*) The right exists, however soft or yielding may be the supporting soil (*Humphries v. Brogden* (1848), 12 Q. B. 739; 76 R. R. 402), or the supported soil (*Trinidad Asphalt Co. v. Ambard*, *ubisup.*).

(*i*) *West Leigh Colliery Co. v. Tunnicliffe and Hampson, Ltd.*, [1908] A. C. 27; reversing the decision of the C. A., [1906] 2 Ch. 22, and restoring that of Swinfen Eady, J., [1905] 2 Ch. 390.

(*j*) See judgment in *Bonomi v. Backhouse* (1859), E. B. & E. 655; 9 H. L. C. 503, establishing the similarity, in this respect, of the acquired easement in respect of an ancient house to the natural right in respect of the soil unencumbered.

(*k*) *Darley Main Colliery Co. v. Mitchell* (1886), L. R. 11 App. Cas. 127; overruling *Lamb v. Walker* (1878), L. R.

3 Q. B. D. 389; *Crumbie v. Wallend Local Board*, [1891] 1 Q. B. 503; and per Lord Blackburn in *Dalton v. Angus* (1881), L. R. 6 A. C. at p. 803. Dist. *Spon v. Green* (1874), L. R. 9 Exch. 99, an action on the covenants for title; and *Great Laxey Mining Co. v. Clague* (1878), L. R. 4 A. C. 115, where compensation was awarded once for all. It does not follow that the person in possession of the land when the subsidence occurs is liable for the damage: *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Hall v. Duke of Norfolk*, [1900] 2 Ch. 493. Cf. as to liability under a covenant in a lease, *Forster v. Elvert Colliery Co.* (1908), W. N. 26. An obstruction to ancient lights is a continuing wrong: *Jenks v. Viscount Clifden*, [1897] 1 Ch. 694.

(*l*) *Stroyan v. Knowles*, and *Hemer v. Knowles* (1861), 6 H. & N. 454; *Hunt v. Peake* (1860), 1 Johns. 705; 29 L. J. Ch. 785. As to the measure of damages in such a case, see below, p. 403, n.

(*m*) Judgment in *Rowbotham v. Wilson* (1860), 8 H. L. C. 348.

[any statutory conveyance, as an enclosure award), or at any subsequent period, or may be acquired by user.

Easement to  
let down soil.

It was said in *Hilton v. Earl Granville* (n), that, "even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd." But this dictum was overruled in *Rowbotham v. Wilson* (o) and *Buchanan v. Andrew* (p), and must be regarded as no longer law (q).

Can be  
granted.

It was in the same case decided that a right in the mine-owner to let down the surface without making compensation could not be claimed by prescription, being oppressive and destructive of the subject-matter of the grant of the surface. This decision was based on the opinion above quoted, that such a right could not be created by an express grant, and, unless it can be supported on some other ground, would seem to fall with it; for any claim which may be lawfully made by grant may be supported by proof of user (r).

Whether can  
be acquired  
by user.

Accordingly, *Hilton v. Earl Granville* has often been treated as overruled or shaken on this point also (s). But in *Blackett v. Bradley* (t), Blackburn, J., in the course of the argument, suggested that "it may be that, though the parties may legally have made such a compact, it would not be reasonable to presume that they had done so;" and this distinction was, in *Bell v. Love* (u), adopted and approved by Baggallay, L. J., who thought *Hilton v. Earl Granville* well decided. Perhaps, if the point should arise, the rule of law laid down in *Hilton v. Earl Granville* (which was decided on demurrer) could scarcely be upheld; but the dictum of Blackburn, J., would be of importance in considering the effect of the evidences.

The decision in *Hilton v. Earl Granville*, so far as it decides that

Cannot be  
acquired by  
custom.

(n) (1845), 5 Q. B. 701, at p. 730; 64 R. R. 604.

(o) (1860), 8 H. L. C. 348.

(p) (1873), L. R. 2 H. L. Sc. 286.

(q) Per Lord Denman in *Blackett v. Bradley* (1862), 1 B. & S. 940, 954; per Lord Hatfield in *Duke of Buccleuch v. Wakefield* (1869), L. R. 4 H. L. 377, 399; per Lord Blackburn in *Dixon v. White* (1883), L. R. 8 App. Cas. 833, 843; and per Baggallay, L. J., in *Bell v. Love* (1883), L. R. 10 Q. B. Div. 547, at p. 561; aff. 9 App. Cas. 286. Cf. per Watson, B., in *Carlyon v. Lovering* (1857), 1 H. & N. at p. 798; and *Great*

*Laxey Mining Co. v. Clague* (1878), L. R. 4 App. Cas. 115. A grant by a copyholder of such a right would be waste, and different considerations therefore apply. See *Richards v. Harper* (1866), L. R. 1 Exch. 199.

(r) *Carlyon v. Lovering* (1857), 1 H. & N. 784, 797. Cf. *Rogers v. Taylor*, *ibid.* 706.

(s) *E.g.*, by Lord Chelmsford in *Duke of Buccleuch v. Wakefield* (1870), L. R. 4 H. L. at p. 410.

(t) (1862), 1 B. & S. at p. 953.

(u) (1883), L. R. 10 Q. B. Div. at p. 561; aff. in D. P. sub nom. *Love v. Bell*, L. R. 9 App. Cas. 286.

Easement to  
let down soil.

[a local custom to let down the surface without making compensation is void for unreasonableness, has not been shaken (x).]

How granted.

But, in order to support a right by grant to let down the surface, there must be clear words indicating an intention to confer such a right, in derogation of the ordinary and *primâ facie* right to support, as against the adjacent owner (y).

Grant of  
minerals not  
enough.

The dicta reported in some cases, that upon a mere grant of the minerals with power to win them, the grantee would not be liable for subsidence caused by working the minerals, cannot be reconciled with the authorities (z); and the contrary has now been expressly decided by the House of Lords. In fact, in all such cases the grant is taken to be subject to the right of support, unless an intention to the contrary appears either expressly or by necessary implication.

Severance  
by Act of  
Parliament.

No distinction upon principle can be made between cases where the severance is by an ordinary conveyance, and where it takes place under the compulsory power of an Act of Parliament (c); but there are cases where the severance has been effected under the provisions of Railway and Canal Acts, and where such Acts have contained express provisions, which have been held to qualify the ordinary right of support (d).

The question, whether the right of support exists, appears to depend, not upon whether the conveyance by which the severance of the lands is effected is purely voluntary or under the provisions of an Act of Parliament, but upon whether the provisions of the Act in the particular case indicate an intention that the right *primâ facie* existing in every case, as between the owner of land and the adjoining owner, subjacent or adjacent, shall be affected.

(x) Cf. *Carlyon v. Lovering* (1857), 1 H. & N. at p. 799; *Marquis of Salisbury v. Gladstone* (1861), 9 H. L. C. 692; *Broadbent v. Wilkes* (1742), Willes, 360, 1 Wils. 63; 2 Str. 1224.

(y) See *Smart v. Morton* (1855), 5 E. & B. 30; *Roberts v. Haines* (1856), 6 E. & B. 643; 7 E. & B. 625; *Dugdale v. Robertson* (1857), 3 Kay & J. 695; *Proud v. Bates* (1865), 11 Jur., N. S. 441; 34 L. J. Ch. 406.

(z) See *Harris v. Ryding* (1839), 5 M. & W. 60; the judgments of Lord Wensleydale, in *Rowbotham v. Wilson* (1860, 8 H. L. C. 360), and Lord Cranworth, in *Caledonian Rail. Co. v. Sprot*

(2 M'Q. Sc. Ap. 451); and *post*, p. 380, ff.

(c) Wood, V.-C., in *North-Eastern Rail. Co. v. Elliott* (1860), 29 L. J. Ch. 808; 1 J. & H. 145; 2 D. F. & J. 423; 10 H. L. C. 333.

(d) *Wyrley Canal Co. v. Bradley* (1806), 7 East, 368; 8 R. R. 642; *Dudley Canal Co. v. Grazebrook* (1830), 1 B. & Ad. 59; 35 R. R. 212; *Stourbridge Navigation Co. v. Earl Dudley* (1860), 3 E. & E. 409; 30 L. J. Q. B. 108; *Great Western Rail. Co. v. Fletcher* (1860), 5 H. & N. 689. See also the judgments in *Caledonian Rail. Co. v. Sprot*, *ubi sup.*; *Same v. Lord Belhaven*, 3 M'Q. Sc. Ap. 56.

[The general rules laid down in the above paragraphs have been illustrated by a large number of decisions, to which it is desirable to refer (e). Easement to let down soil.

Dealing first with the decisions on grants or reservations by deed, or under private or local Acts of Parliament, it appears that there are but few reported cases in which words of grant or reservation have been held sufficiently clear to negative the right of support. Private grants or reservations.

In *Roubotham v. Wilson* (f), an instrument of allotment, which awarded to different persons the surface of certain lands and the mines beneath them, contained a declaration that the allottees of the mines might hold and work them without any molestation, denial, or interruption by the surface owners, "and without being subject or liable to any action or actions for damage on account of working and getting the said mines, for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows or being otherwise defaced or injured where such mines shall be worked," the proprietors having agreed to accept their allotments "subject to any inconvenience or incumbrance which may arise from the cause aforesaid"; it was held that the allottees of mines could let down the surface. Cases in favour of the easement.  
*Roubotham v. Wilson.*

In *Duke of Buccleuch v. Wakefield* (g), a special Inclosure Act, under which common lands were allotted, reserved to the lord of the manor the mines, minerals, and quarries upon, with, and under the common lands, with power to come upon the common lands, to search, bore, and dig for mines, minerals, and quarries, to sink shafts and open veins upon the lands, to land, store, and take away the minerals, to make roads, divert brooks, cut sluices, sink and drive pits, levels, and soughs or other necessary works, as the lord should think proper, to build workmen's cottages, erect machinery, and generally to do all things whatever for getting the minerals, as if the common lands had remained open and uninclosed, paying reasonable compensation for damage done by such works as aforesaid; it appeared that the soil was so friable that the mines could not be worked at all without destroying the surface. It was held that the lord might let down the surface so as to destroy the land above, subject only to the liability to pay compensation for damage done. *Duke of Buccleuch v. Wakefield.*

(e) See these cases collected and considered in a Treatise on the Law of Support, by G. Banks, 1894.

(f) (1860), 8 H. L. C. 348.

(g) (1869), L. R. 4 H. L. 377.

Easement to  
let down soil.

*Williams v.  
Bagnall.*

[In *Williams v. Bagnall* (*h*), a conveyance excepted the mines and power to work them without entering on the surface land conveyed, "and without being answerable for any injury whatsoever that shall or may arise to the said land and premises, or to any of the buildings which shall at any time hereafter be erected upon the said land or any part thereof, by reason of the working or getting the said excepted mines from under the same premises"; and this was held effectually to negative the right of support.

*Aspden v.  
Seddon.*

In *Aspden v. Seddon* (*i*), a grantor conveyed away a plot of land upon which a cotton mill was to be built, reserving to himself and his assigns the mines and the right to win and carry away the minerals, "and to do all things necessary for effectuating all or any of the aforesaid purposes, but without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof." It was held by the Lords Justices, affirming the decree of Jessel, M. R., and distinguishing *Caledonian Railway v. Sprot* (*k*), that the grantor could, under the reservation, let down the surface so as to destroy the buildings. Compensation was subsequently awarded at law under the condition (*l*).

*Gill v.  
Dickinson.*

In *Gill v. Dickinson* (*m*), to a claim for working mines under the plaintiff's land so as to let down the surface, the defendant pleaded that he was the lessee of the mines from the lord of the manor; that the plaintiff's land had been part of the waste; that until the passing of a special Inclosure Act the lord had been accustomed to work the mines without paying any satisfaction for injury caused by such working; and that the Inclosure Act had provided that the lord, his successors and assigns, should have the mines and the right of searching for, winning, and working them "as fully and freely as he or they might or could have had and enjoyed the same in case the Act had not been made, and that without making or paying any satisfaction for so doing." The Act provided for the compensation of the person injured by the owners of the other allotments. On demurrer, it was held that the defence was sufficient, as, whether or not the custom was good (*n*), the express

(*h*) (1867), 15 W. R. 272.  
(*i*) (1876), L. R. 10 Ch. 394.  
(*k*) 2 Macq. 449.

(*l*) (1876), L. R. 1 Exch. D. 496.  
(*m*) (1880), L. R. 5 Q. B. D. 159.  
(*n*) Above, p. 375.

[enactment covered the case. *Blackett v. Bradley* (o), a case decided on the same Act, but where the point had not been taken, was overruled. Easement to let down soil.

In *Buchanan v. Andrew* (p), the appellant Buchanan had granted a feu of land in Lanarkshire to Porteous, who had bound himself to build a house upon it. The grant reserved to the superior the minerals underneath the land, with a stipulation that the superior "should not be liable for any damage that might arise to the surface land feued or the buildings that might be erected thereon from working and carrying away the minerals underneath." Damage having arisen, the House of Lords treated the reservation as operative, and declined to restrain the superior from working the mines. *Buchanan v. Andrew.*

In *Consett Waterworks Co. v. Ritson* (q) it was held, upon the terms of a private Inclosure Act, that the lord of the manor was empowered to work mines under certain allotments, and so to let down the surface of the land, without paying damages or making compensation to the allottees. *Consett Waterworks Co. v. Ritson.*

Lastly, in *Bell v. Earl of Dudley* (r), where an Act for enclosing waste lands reserved to the lord the mines and minerals, with full power to work them "without paying or making any satisfaction to any person or persons whomsoever for the same or the damage to be done thereby," and threw any damage caused by working the mines on the allottees rateably, including the lord, it was held that an allottee had no right to support. In this case Chitty, J., summarized the prior decisions as follows: "Where, as here, the ownership of the minerals and of the surface is severed, the *prima facie* inference is that the owner of the surface shall enjoy the surface allotted, and shall have the common right of support for his tenement. The inference is strong; in order to rebut it the burden lies on the owner of the minerals to show affirmatively and by clear words that he has the right of letting down the surface. *Bell v. Earl of Dudley.*

(o) (1862), 1 B. & S. 940; 31 L. J. Q. B. 65.

(p) (1873), L. R. 2 Sc. App. 286.

(q) (1889), L. R. 22 Q. B. D. 318; 60 L. T. 360; 53 J. P. 573; reversed on appeal, 22 Q. B. Div. 702. This case is very shortly reported on appeal in the Law Reports, and the judgments of the Court of Appeal (which were referred to by the Court in *Bell v. Earl*

*of Dudley*) are given at greater length in a note to *Bell v. Earl of Dudley*, 43 W. R. 122. The case was, however, adversely commented on by Lord Macnaghten in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, at p. 314, and must now be considered of doubtful authority.

(r) [1895] 1 Ch. 182. Cf. *Thompson v. Mein*, W. N. (1893), p. 202.

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[When clear words are spoken of, it is not meant that the Act must say in express terms that the mineral owner may let down the surface. . . . The presence or absence of a compensation clause is an important element: the *prima facie* inference in favour of the surface owner is strengthened by the absence of any provision for compensation; the presence of a limited compensation clause is not of itself sufficient to rebut the inference.]

Cases of  
demise.

To the above decisions in favour of the mine-owner must be added certain cases on mining leases, in which the forms of the leases have been held to release the lessee from the common law obligation to support the superjacent land (\*). It was said in one of these cases that "the contract would regulate the obligations and the rights of the parties" (†). But, if this dictum was intended to mean that, in the case of a mining lease, there is no presumption in favour of the obligation to support the surface, it cannot be regarded as law. The law as between lessor and lessee is the same as the law between grantor and grantee, except that, where one grants a lease reserving a royalty, he may have an inducement to empower the lessee to let down the surface if the surface is of less value than the minerals. The rule of law is the same; but the presumption against the grant is slightly less strong (‡).

Cases against  
the easement.

In the remaining cases in which the assistance of the Court has been asked in construing private grants and reservations of minerals, and of the right to work them, the decision has been uniformly in favour of the common law right of support being retained. The principal cases of this nature are:—*Harris v. Ryding* (x), where the grantor reserved the mines and minerals, with power to come upon the surface, to get and carry away the minerals, and to sink shafts, "making a fair compensation to T. P. (the grantee of the surface) for the damage to be done to the surface of the said premises or the pasture and crops growing thereon"; *Smart v. Morton* (y), where the reservation was somewhat similar, but the grantor covenanted to pay treble damages for any damage caused; *Roberts v. Haines* (z), where the power to

(\*) *Taylor v. Shafto* (1867), 8 B. & S. 228; *Shafto v. Johnson* (1863), *ibid.* 252, n.; *Smith v. Darby* (1872), L. R. 7 Q. B. 716; *Eaton v. Jeffcock* (1872), L. R. 7 Exch. 379.

(†) *Per Cleasby, B.*, L. R. 7 Exch. 388.

(‡) *Davis v. Tyebarne* (1881), L. R. 6

App. Cas. 460, 466. Cf. *per Jessel, M.R.*, L. R. 10 Ch. 399, n. *Dugdale v. Robertson* (1857), 3 K. & J. 695, has been doubted, but not overruled.

(x) (1839), 5 M. & W. 60.

(y) (1855), 5 E. & B. 30.

(z) (1856), 6 E. & B. 643.

[work mines was contained in an Inclosure Act, which also made special provisions (which had not been infringed) for the support of surface buildings by fixing certain limits within which no working should take place at all; *Allaway v. Wagstaff* (a), where the subsidence was held not to be "surface damage" within the meaning of the Act for regulating mining in the Forest of Dean; *Proud v. Bates* (b), where the reservation was contained in a lease; *Bell v. Wilson* (c), where the minerals reserved included freestone, which was admitted not to be commonly got by underground working; *Hert v. Gill* (d), where the reservation extended to china clay, which could not be got without destroying the surface; *Benfieldside Local Board v. Consett Iron Co.* (e), where words in themselves wide were held to be qualified by an express grant to the public of a right inconsistent with the destruction of the surface; *Davis v. Treharne* (f), where the grant relied upon was contained in a mining lease, which authorized the lessee to work the mines "in the usual and most approved way in which the same was performed in other works of the like kind in the county," and provided for compensation for "damage or injury to the surface"; *Mundy v. Duke of Rutland* (g), where the reservation, being vague, was not permitted to operate in the grantor's favour; *Chapman v. Day* (h), where full compensation was provided for "loss or injury . . . by reason of the working of the minerals"; *Dixon v. White* (i), where a lessee of "the whole coal" under certain lands was empowered to work and win it, but not to "break the surface" of the land, and the lease stipulated that he should indemnify the lessor for the "whole damage and injury occasioned by the aforesaid operations"; *Love v. Bell* (k), where an Inclosure Act provided that the lords of the manor should hold and enjoy all mines, &c. "in as full, ample, and beneficial a manner to all intents and purposes" as if the Act had not been passed, and that the mine-owner should make satisfaction (not to exceed 5*l.* per acre per year) for "damages and spoil of ground" occasioned by his working to the person in possession of the surface; *London and*

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Cases against  
the easement.

(a) (1859), 4 H. & N. 681.

(b) (1865), 34 L. J. Ch. 406.

(c) (1866), L. R. 1 Ch. 303; dist.  
*Att.-Gen. v. Welsh Granite Co.* (1887), 35  
W. R. 617.

(d) (1872), L. R. 7 Ch. 639.

(e) (1877), L. R. 3 Exch. D. 54.

(f) (1881), L. R. 6 App. Cas. 460.  
Cf. *Greenwell v. Low Beechburn Coal Co.*,

[1897] 2 Q. B. 165.

(g) (1882), L. R. 23 Ch. Div. 81.

(h) (1883), 47 L. T. 705.

(i) (1883), L. R. 8 App. Cas. 833.

(k) (1884), L. R. 9 App. Cas. 288. Cf.  
*Twyerould v. Chamber Colliery Co.*, W. N.  
(1892), p. 27; affd. in H. L., but not  
reported.



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Cases against  
the easement.

[*North-Western Rail. Co. v. Evans* (l), where an Act authorizing the undertakers to maintain the navigation of a brook did not expressly refer to minerals; *Great Western Rail. Co. v. Cefn Cribbar Brick Co.* (m), where a conveyance of land for a horse-tramway reserved the adjacent mines with power to work them, but not so as to injure the tramway; *New Sharlston Collieries Co., Ltd. v. Earl of Westmoreland* (n), where the grantee covenanted to make satisfaction to be assessed as therein mentioned for the spoil or damage or injury done; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co., Ltd.* (o), where a canal company having under statutory authority acquired lands, paying compensation in accordance with their Act, it was held that the owners of the sub-jacent and adjacent land were entitled to work and win coal only in so far as it could be done without injuring the support of the canal; *Clippens Oil Co., Ltd. v. Edinburgh and District Water Trustees* (p), a case of support to a water pipe laid under statutory authority, the uninterrupted enjoyment for nearly eighty years being held to raise a presumption that whatever was necessary to obtain the right to support for the pipe had been done; *Butterknowle Colliery Co., Ltd. v. Bishop Auckland Industrial Co-operative Co., Ltd.* (q), where an Inclosure Act empowered the lords of the manor to work the mines and minerals under the allotments as fully and freely as they might or could have done if the Act had not been passed, "and that without making or paying any satisfaction for so doing"; and contained a compensation clause providing that any damage done to an allottee by the exercise of the powers reserved to the lords should be paid for by an assessment upon the occupiers of the other allotments; and *Manchester Corporation v. New Moss Colliery, Ltd.* (r), where it was held that sect. 23 of the Waterworks Clauses Act, 1847, which gives to the owner of minerals under lands adjacent to a reservoir the right to work such mines, after notice duly given under the provisions of the Act, does not take away the common law right to support in respect of the land upon which the reservoir is situate.

Result of the  
authorities.

As a result of these authorities, it may now be taken as "perfectly settled ground that as of common right the surface

(l) [1893] 1 Ch. 16.

(m) [1894] 2 Ch. 157.

(n) (1900), 82 L. T. 725; [1904] 2 Ch. 443, n.; affirming the decision of North, J., 79 L. T. 716, and the C. A., 80 L. T. 846.

(o) (1901), 85 L. T. 53.

(p) [1904] A. C. 64.

(q) [1906] A. C. 305; affirming the decisions of Farwell, J., and the C. A., [1904] 2 Ch. 419.

(r) [1906] 2 Ch. 564.

[land has a right to be supported by subjacent strata of minerals. Although that is of common right, it may be shown,—the burden lying on those who wish to show it,—that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that, before he got it, the person from whom he claims, the owner of the surface, had parted with the right of support from below" (s).

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The principle that an owner cannot derogate from his grant was thought to create a presumption in every case against the grantor and in favour of the grantee (t); but the question is now reduced to one of construction (u).

The provision of compensation for damage may sometimes affect the judgment of the Court in favour of the right to let down the surface (x), and the wording of such a provision may even operate so as to extend the powers reserved (y). But it must be remembered that compensation may sometimes be made payable for acts which are forbidden; it may be intended as a collateral remedy, not for the use of the powers intended to be conferred (z), but for their abuse (a).

Certain Acts contain express provisions as to working the minerals under or near to lands purchased for the construction of railways or other statutory undertakings, and these of course stand upon a footing apart from the ordinary law (b).

Power to work mines on notice.

Thus, by the Railways Clauses Act, 1845, it is provided (c) that a railway company shall not in the first instance (d) be entitled to the mines and minerals (e) under the land purchased by them;

Railway Acts.

(s) Per Lord Blackburn in *Davis v. Treharne* (1881), L. R. 6 App. Cas. 466. As to notice of the covenant or release of the right, see *Richards v. Harper* (1866), L. R. 1 Exch. 199; and *Rowbotham v. Wilson* (1860), 8 H. L. C. 348.

(t) *Proud v. Bates*, ubi sup. Cf. *Mundy v. Duke of Rutland*, ubi sup.

(u) Per Lord Blackburn in *Dixon v. White* (1883), L. R. 8 App. Cas. p. 843.

(z) Per Jessel, M. R., in *Aspden v. Seddon* (1875), L. R. 10 Ch. 396, n.; and per Chitty, J., in *Bell v. Earl of Dudley*, [1895] 1 Ch. 186; and see *Barr v. Baird* (1904), 6 F. 524; *Mews' Digest*, col. 255.

(y) *Aspden v. Seddon* (1875), L. R. 10 Ch. 394. Cf. per Lord Watson in *Love v. Bell* (1884), L. R. 9 App. Cas. at p. 299; and *Att.-Gen. v. Welsh*

*Granite Co.* (1887), 35 W. R. 617.

(z) *Aspden v. Seddon*, ubi sup.

(a) *Dixon v. White*, ubi sup.

(b) Per Lord Cranworth in *Midland Rail. Co. v. Robinson* (1889), L. R. 15 A. C. 19. As to the support of sewers, &c. carried through land not purchased by the undertakers, see above, p. 114, n.

(c) Sects. 77 to 85.

(d) I.e., unless they expressly purchase the mines. *Errington v. Metropolitan District Rail. Co.* (1881), L. R. 19 Ch. Div. 559.

(e) As to what are "mines and minerals," see *Bell v. Wilson* (1866), L. R. 1 Ch. 303 (freestone); *Midland Rail. Co. v. Checkley* (1867), L. R. 4 Eq. 19 (stone); *Hext v. Gill* (1872), L. R. 6 Ch. 699 (china clay); *Midland Rail. Co. v. Haunchwood Brick and Tile Co.* (1882),

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[but before working (*f*) any mines or minerals lying under the railway or the works connected therewith or within the prescribed distance (forty yards unless otherwise provided by the company's special Act) therefrom, the owner or occupier must give to the company notice of his intention so to do, and thereupon the company may give a counter-notice to the effect that they are willing to make compensation (*g*) for the mines, or on default for thirty days in giving such counter-notice the owner may work the mines in a proper and usual manner as provided by the Act. Under this statute it has been held that, when notice has been duly given of an intention to work the mines and the company have elected not to pay compensation for them, the owner (though himself the vendor of the surface to the company) may work all minerals within the prescribed distance without leaving support for the railway (*h*), but subject to the common law rights of the railway company, that is to say, the right to support for the surface unburdened by the greater weight imposed thereon by the railway (*i*). But when compensation has been tendered, the

L. R. 20 Ch. D. 552 (clay); *Att.-Gen. v. Welsh Granite Co.* (1887), 35 W. R. 617 (granite); *Lord Provost and Magistrates of Glasgow v. Farie* (1888), L. R. 13 A. C. 657 (clay); *Earl of Jersey v. Neath Poor Law Union* (1889), L. R. 22 Q. B. Div. 555 (brick earth and clay); *Midland Rail. Co. v. Robinson* (1889), L. R. 15 A. C. 19 (limestone); *Ruabon Brick and Terra Cotta Co. v. Great Western Rail. Co.*, [1893] 1 Ch. 427 (clay); *Great Western Rail. Co. v. Blades*, [1901] 2 Ch. 624; *In re Todd, Birleston & Co. and the North-Eastern Rail. Co.*, [1903] 1 K. B. 603; *North British Railway v. Turners, Ltd.* (1905), 6 F. 900; *Mews' Digest*, col. 257 (clay held not a mineral). As to substances other than "mines and minerals," it seems that the company would have the ordinary rights of a private owner (above, p. 376).

(*f*) There must be a bona fide intention on the part of the owner to work the minerals by himself, his lessees or licensees. *Midland Rail. Co. v. Robinson*, *ubi sup.*

(*g*) The compensation is ascertained under the Lands Clauses Act. *Reg. v. London and North-Western Rail. Co.*, [1894] 2 Q. B. 512. As to the right of a life tenant in respect of the compensation money, see *In re Barrington* (1886), L. R. 33 Ch. D. 523; *In re Robinson's Settlement Trusts*, [1891] 3 Ch.

129. As to taking into consideration a subsequent rise in the price of coal, see *Bwlfa and Merthyr Dare Steam Collieries* (1891), *Ltd. v. The Pontypridd Waterworks Co.*, [1903] A. C. 426; and, generally, as to the principle applicable in assessing the compensation, *James Joicey & Co., Ltd. v. The North-Eastern Rail. Co.*, [1906] 1 K. B. 195; reversed by C. A., [1907] 1 K. B. 402, but restored by House of Lords sub nom. *Eden v. North-Eastern Rail. Co.*, [1907] A. C. 400. As to interest upon compensation money between date of notice and award, *Fletcher v. Lancashire and Yorkshire Rail. Co.*, [1902] 1 Ch. 901 (interest allowed under provisions of a private Act); *In re Richard and the Great Western Rail. Co.*, [1905] 1 K. B. 68 (interest disallowed under Railways Clauses Act, 1845).

(*h*) *Great Western Rail. Co. v. Fletcher* (1860), 5 H. & N. 689; *Great Western Rail. Co. v. Bennett* (1867), L. R. 2 H. L. 27; *Pountney v. Clayton* (1883), L. R. 11 Q. B. Div. 820 (a case of superfluous land, as to which see *Banks on Support*, pp. 109, 145); *Ruabon Brick and Terra Cotta Co. v. Great Western Rail. Co.*, [1893] 1 Ch. 427 (a case of open workings).

(*i*) *Manchester Corporation v. New Moss Colliery, Ltd.*, [1906] 2 Ch. 564. This case was decided under the Water-

[working will be restrained by injunction (*k*) ; and the company are not bound to give the counter-notice not to work the mines within the thirty days, but may at any time stop the working on the terms of paying compensation for the minerals then remaining unworked (*l*).

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When a Canal Company's Act contains similar provisions, the like principles of course apply (*m*) ; and in a case (*n*) where the Act provided that, on the canal company's failure to purchase after due notice, the owner might work the mines, and it was provided that "in working such mines no injury be done to the said navigation," it was held that the proviso must be construed as referring to extraordinary or unnecessary damage, and not as cutting down the power to work the mines in the usual course. But where the Act contained no clause requiring the mine-owner to give notice of his intention to work the mines or enabling him to work them on the failure of the company to pay compensation, it was held that the Dudley Canal case did not apply, that a proviso against working the mines so as to "injure, prejudice, or obstruct the canal" must be construed in the ordinary sense of those words, and that the mine-owner's right was to compensation (*o*).

Canal Acts.

Somewhat similar questions may arise under the Waterworks Clauses Act, 1847 (*p*), the Highways and Locomotives (Amend-

works Clauses Act, 1847, but sects. 18—27 of that Act are to the same effect as the sections under consideration.

(*k*) *Smith v. Great Western Rail. Co.* (1877), L. R. 3 A. C. 165.

(*l*) *Dixon v. Caledonian and Glasgow and South-Western Rail. Cos.* (1880), L. R. 5 A. C. 820. As to the right to tunnel under the railway, see *Midland Rail. Co. v. Miles* (1885), L. R. 30 Ch. D. 634 ; (1886), L. R. 33 Ch. D. 632. And as to claims for prospective injury to mines not taken, see *Holliday v. Mayor, &c. of Wakefield*, [1891] A. C. 81 ; *Re Lord Gerard and London and North-Western Rail. Co.*, [1895] 1 Q. B. 459.

(*m*) *Wyrley Canal Co. v. Bradley* (1806), 7 East, 368 ; 8 R. R. 612.

(*n*) *Dudley Canal Navigation Co. v. Grazebrook* (1830), 1 B. & Ad. 59 ; 35 R. R. 212. Cf. *Stourbridge Navigation Co. v. Earl Dudley* (1860), 3 E. & E. 409 ; 30 L. J. Q. B. 108.

(*o*) *Knowles & Sons v. Lancashire and*

*Yorkshire Rail. Co.* (1869), L. R. 14 A. C. 218 ; *Glamorganshire Canal Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53 ; cf. *Cromford Canal Co. v. Cutts* (1848), 5 Railw. Cas. 442. Dist. *Chamber Colliery Co. v. Rochdale Canal Co.*, [1895] A. C. 564, and *New Moss Colliery Co. v. Manchester, Sheffield, and Lincolnshire Rail. Co.*, [1897] 1 Ch. 725, in which cases the Act contained no prohibition against working the adjacent mines so as to injure the canal. In *Midland Rail. Co. v. Checkley* (1867), L. R. 4 Eq. 19, compensation was allowed in respect of mines beyond the prescribed distance ; but possibly this was considered to be payable under sect. 60 of the Act.

(*p*) Sects. 18 to 27 ; *Holliday v. Mayor, &c. of Wakefield*, [1891] A. C. 81. Cf. *Consett Waterworks Co. v. Ritson* (1889), L. R. 22 Q. B. D. 318 ; reversed on another point, *ibid.* 702, above, p. 379 ; *Manchester Corporation v. New Moss Colliery, Ltd.*, [1906] 2 Ch. 56.

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[ment) Act, 1878 (q), and the Public Health Act, 1875 (Support of Sewers), Amendment Act, 1883 (r).]

Civil law.

By the civil law, this right of support from the neighbouring soil was recognized in the restrictions it imposed upon the doing such acts as would naturally have the effect of withdrawing such support: "If a man dig a sepulchre, or a ditch, he shall leave (between it and his neighbour's land) a space equal to its depth; if he dig a well, he shall leave the space of a fathom" (s).

Code Civil.

A similar enactment has been introduced into the French law (t). "Whoever digs a well or ditch near a wall, whether party or otherwise, whoever wishes to build against (such wall) a chimney, forge, or oven, to erect a stable against it, or establish a magazine of salt, or any corrosive materials, must leave the interval prescribed by law and custom in this respect, or construct the works prescribed by law to prevent injury to his neighbour." In commenting upon this article of the Code, a learned French author says, "It appears to me, that the principle of this Article of the Code (674) should be extended to numerous other cases, which will undoubtedly be settled by particular enactments of the rural laws, and which, until such laws are made, should be decided in conformity with local usages; or, if they are silent, with the precepts of equity. Thus, if an individual makes a fish-pond or lake on his own property, he ought to leave a sufficient extent of land to separate it from his neighbour who has already a similar reservoir." "By parity of reasoning, the owner of land who is desirous of quarrying on his own property for stone or sand, or similar materials, must not open the earth at the extreme point which separates his land from that of his neighbour, and continue to excavate perpendicularly, because his neighbour's land, thus deprived of support, would be in danger of falling in (éboulement)" (u).

Pardessus.

(q) Sect. 27; *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B., at pp. 308, 313.

(r) *Jary v. Barnsley Corporation*, [1907] 2 Ch. 600. See further upon the subject of this paragraph, above, p. 113, note (g).

(s) Si quis sepem ad alienum prædium fixerit infoderitque terminum ne

excedito: si maceriam, pedem relinquit; si vero domum, pedes duos; si sepulchrum aut scobem foderit, quantum profunditatis habuerint, tantum spatii relinquit; si puteum, passus latitudinem.—Dig. 10, 1, 13, fin. reg.

(t) Code Civil, Art. 674.

(u) Pardessus, *Traité des Servitudes*, 302.

SECT. 2.—*Support to Buildings from adjacent Land.*

Where, however, anything has been done to increase the lateral pressure, as where buildings have been erected, it appears to be clearly settled that no man has a right to such increased support unless the building, or other thing which makes it necessary, is of ancient erection. This was laid down in a very early case. "If A. is seised in fee of copyhold land closely adjoining the land of B., and A. erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B., if B. afterwards dig his land so near to the foundation of the house of A., but not in the land of A., that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by A. against B., inasmuch as it was the fault of A. himself that he built his house so near the land of B., for he cannot by his (own) act prevent B. from making the best use of his land that he can" (x).

Superincumbent buildings not entitled by the common law to support.

*Wilde v. Ministerley.*

In *Wyatt v. Harrison* (y), the declaration stated that the plaintiff was possessed of a certain dwelling-house—that the defendant, in rebuilding his dwelling-house adjoining, dug so negligently, carelessly, and improperly into the soil and foundation of his own dwelling-house, and so near the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof the plaintiff's wall gave way and was damaged. To so much of this declaration as "related to the defendant's digging into the soil and foundation of the said dwelling-house of him the defendant, so near to the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof," &c., the defendant demurred generally. Lord Tenterden, in delivering the judgment of the Court, after time taken to consider, said: "The question reduces itself to this, whether, if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there so as to remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? Whatever the law might be if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might

*Wyatt v. Harrison.*

(x) *Wilde v. Ministerley* (1840), 2 Rolle's Abr. 564, Trespass, Justification, J. pl. 1.

(y) (1832), 3 B. & Ad. 871; 37 R. R. 566.

Buildings not  
entitled by  
the common  
law to support.

*Wyatt v.  
Harrison.*

imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then according to the authorities, the plaintiff is not entitled to recover. It may be true, that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action; but if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle, Ab. (z). The judgment will therefore be for the defendant" (a).

*Slingsby v.  
Barnard.*

In the case of *Slingsby v. Barnard* (b), the action was brought, not for the withdrawal of support to the plaintiff's house, which was stated in the declaration "to be a modern house, but for digging so near to the foundation of the plaintiff's house that the defendants undermined his house (undermine son mese), by reason whereof one-half of the said house fell into the said pit so dug by defendant Hall." In the motion in arrest of judgment, which was made upon entirely different grounds, and refused by the Court, there is no allusion to any claim of support.

*Partridge v.  
Scott.*

This principle was fully recognized and acted upon in the later and very important case of *Partridge v. Scott* (c). The action was brought for an injury to the plaintiff's reversion by defendants "undermining their own land, wrongfully, carelessly, negligently, and improperly, and without supporting or propping up the same," and removing the minerals, to the support of which mines and minerals for his premises the plaintiff was entitled; by reason whereof, and by the carelessness and improper conduct of the defendants, the foundation of the plaintiff's premises was injured, the ground gave way, and the walls and houses were damaged. The second count was similar, referring to an injury to another messuage. The defendants pleaded, denying the plaintiff's right

(z) Trespass, J. pl. 1.

(a) In *Smith v. Martin*, 2 Saund. 394 (cited in argument), the declaration was similar to the one in this case, containing no allegation that the house of the plaintiff was an ancient one; but no point on the law of easements was

raised. See in *Langford v. Woods* (1844), 7 M. & G. 625, a count for withdrawing support from an ancient house.

(b) 1 Rolle, Rep. 430; [see L. R. 6 App. Cas. at p. 742, per Pollock, B.]

(c) (1838), 3 M. & W. 220; 49 R. R. 578.

to support, as claimed in the declaration. The jury found for the plaintiff, subject to a case. After stating the pleadings, the case proceeded as follows:—"The jury found that the plaintiff was possessed of a certain dwelling-house and premises, partly erected upon excavated land within four years before the injury complained of, being the house and premises to which the second count in the declaration referred, and of other houses, land, and premises, the buildings of which have been erected about thirty years before, and which are those included in the first count.

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law to support.

*Partridge v.  
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"They also found that the defendants excavated so near their own boundary (the direction of which boundary was east and west) the mines belonging to themselves, as to cause damage thereby to all the plaintiff's premises, and to cause the adjoining land of the plaintiff, not covered with buildings, to sink also. The defendants began to work their mines after the new house and buildings of the plaintiff had been finished. They sunk their shaft or pit about one hundred yards from the plaintiff's premises on the south side thereof, and worked the coal northward towards those premises.

"The jury also found that, in order to have prevented any injury from the defendants' works to the plaintiff's premises, a rib of coal ought to have been left between those parts of the substrata over which the plaintiff's buildings and premises were situated and the works of the defendants, at least twenty yards in thickness; that the defendants worked their mines, leaving a rib of coal in these places of less than ten yards in thickness, and that they were aware that the coal had been worked out some years before on the north or plaintiff's side of their boundary, where the boundary joined the plaintiff's premises; that in so doing the defendants were guilty of negligence in not leaving a rib of sufficient thickness, if the plaintiff was entitled to support from the defendants' land and substrata. The Court are to be at liberty to draw any reasonable conclusion which the jury might have drawn.

"The question for the opinion of the Court is, whether, under the above circumstances, the plaintiff is entitled to recover; and, if he is, then whether he is entitled to damages for the old houses and land alone, or for the more recent erections also?" The case having been argued, the Court took time to consider: the judgment of the Court was delivered by Alderson, B.:—

"The two questions in this case are of considerable importance. The facts may be shortly thus stated: The plaintiff was possessed of two houses, one an ancient one, and the other built long within



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twenty years before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the ancient house, and the Court cannot therefore intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago.

"Under these circumstances, the question is precisely similar as to both houses, and is one on which the Court do not entertain any doubt.

"Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* (d) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

"In this case, if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants; unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord Tenterden's Act, until after the lapse of at least twenty

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(d) (1832), 3 B. & Ad. 871; 37 R. R. 566.

years from the time when the house first stood on excavated ground, and was supported in part by the defendant's land.

Buildings not entitled by the common law to support.

"If the law stood as it did before Lord Tenterden's Act (2 & 3 Will. 4, c. 71, s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that Act, the lapse of time, under these peculiar circumstances, would probably make no difference. For the proper construction of that Act requires that the easement should have been enjoyed for twenty years under a *claim of right*. Here neither party was acquainted with the fact that the easement was actually used at all; for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right; and that Lord Tenterden's Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point.

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"We think, upon the whole, that the defendants are entitled to our judgment."

[In *Dalton v. Angus* (e), Lord Selborne, touching on this question, said: "Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist" (f).

*Dalton v. Angus.*  
Support to buildings acquired by twenty years' enjoyment.

On the other hand, it is now settled that an enjoyment of support for not less than twenty years will be sufficient to confer a right, subject only to the conditions which limit all acquisition of rights by length of enjoyment only.

In *Palmer v. Fleshers* (g), the judges in their first resolution say, "that if a man being seised of land leases forty feet to A. to build a house thereon, and forty feet to B. for a like purpose, and one of them builds a house, and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for everyone may deal with his own to his best advantage; but, semble, that it would be otherwise if the wall or house were an ancient one."]

*Palmer v. Fleshers.*

(e) (1881), L. R. 6 App. Cas. at p. 792.

(f) See also the cases on the rights of public bodies, quoted above, p. 113, note (g). The principle appears to apply to subjacent as well as to adjacent soil,

notwithstanding the dicta in *Rogers v. Taylor* (1858), 2 H. & N. 828.

(g) (1875), 1 Sid. 167; cited Com. Dig., Action on the case, Nuisance, C.; above, p. 121.

Support to  
buildings  
acquired by  
twenty years'  
enjoyment.

*Stansell v.  
Jollard.*

It was laid down by Lord Ellenborough in *Stansell v. Jollard* (h), that where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or, as it were, of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support, but that it was otherwise of a house, &c. newly built.

*Dodd v.  
Holme.*

In the case of *Dodd v. Holme* (i), the Court did not pronounce any decided opinion as to the right of support for an ancient house from the adjoining land; but Littledale, J., in the course of the argument, observed: "Suppose the house to have been substantially built, to have stood thirty or forty years, and to have been kept in proper repair, do you say, that if the defendant, by excavating his adjacent ground, let down that house, though without actual negligence on his part, an action would not lie against him?"

*Hide v.  
Thornborough.*

[In *Hide v. Thornborough* (k), Parke, B., said: "If there was twenty years' enjoyment by the plaintiff of the support of the house from the defendant's land, and it was known that the defendant's land supported the plaintiff's house, that is sufficient to give him a right of support."

*Gayford v.  
Nicholls.*

And in *Gayford v. Nicholls* (l), Parke, B., said: "This is not a case in which the plaintiff has the right of the support of the defendant's soil, either by virtue of a twenty years' occupation or by reason of a presumed grant or presumed reservation, where both houses were originally in the possession of the same owner, for unless a right by some such means is established the owner of the soil has no right of action against his neighbour for the proper exercise of his own right."

*Rowbotham v.  
Wilson.*

In *Rowbotham v. Wilson* (m), Bramwell, B., said: "After a house has stood in such a position twenty years, it acquires a right to support from the adjoining land."

All these dicta have reference to the support of the adjacent soil; and in the cases of *Humphries v. Brogden* and *Bonomi v. Backhouse*, already cited, will be found dicta to the same effect.

*Solomon v.  
Vintners' Co.*

In the case of *Solomon v. Vintners' Co.* (n), doubts are expressed

(h) M.S. 1 Sel. N. P. 457, 11th edit.  
(i) (1834), 1 A. & E. 493; 40 R. R. 344; post, p. 419.  
(k) (1846), 2 C. & K. 250; 80 R. R. 841.

(l) (1854), 9 Exch. 708.

(m) (1860), 8 El. & Bl. 140; affd. 8 H. L. C. 348.

(n) (1869), 4 H. & N. 598.

[by the Court upon this subject; but it is to be observed that that case was one of a claim for support of one building by another in a state of things caused by an accidental subsidence of the houses, and not the ordinary case of a house built originally upon the edge of land and obviously so as to be affected by the removal of the adjoining land. The authorities referred to by the Court with doubt have reference to such cases as this, and not to such a one as that before the Court; see the observations of the Vice-Chancellor Wood, in the case of *Hunt v. Peake* (o), as to this point.

Support to buildings acquired by twenty years' enjoyment.

*Solomon v. Vintners' Co.*

It was laid down in the judgment of the Court of Exchequer Chamber, in *Bonomi v. Backhouse* (p), that the right of support for buildings, when acquired, is precisely similar in its character to the natural right of support for the soil.

So the authorities stood when the now leading case of *Angus v. Dalton* and the Commissioners of her Majesty's Works and Public Buildings (q) came to be decided. The action was brought by the owners in fee of a coach factory at Newcastle-upon-Tyne, to recover damages for injuries caused by the defendants the Commissioners, and by their contractor the defendant Dalton, in excavating the soil of the adjoining property, on which the Probate Office was to be built, and thereby causing the plaintiffs' factory to fall. It appeared that the plaintiffs' building and the adjoining building on the defendants' land were estimated to be upwards of a hundred years old; that up to the year 1849, being about twenty-seven years before the accident, both houses had

*Angus v. Dalton.*

(o) (1860), 29 L. J. Ch. 785; 1 Johns. 705. If buildings or other structures be already erected upon the land at the time of the severance, the right of support for them would exist by implied grant (see judgments in *Dugdale v. Robertson* (1857), 3 K. & J. 695; *Caledonian Rail. Co. v. Sprot*, 2 M'Q. Sc. App. 449; *Richards v. Rose*, ante, p. 159; cf. *Union Lighterage Co. v. London Graving Dock Co.*, [1901] 2 Ch. 300; [1902] 2 Ch. 557); and if the surface were conveyed for the express purpose of erecting buildings or any other structure, the right of support would also exist. See judgments in *Caledonian Rail. Co. v. Sprot*, 2 M'Q. Sc. App. 449; *North Eastern Rail. Co. v. Elliott* (1860), 29 L. J. Ch. 808; 1 J. & H. 145; on appeal, 30 L. J. Ch. 160; 2 De G. F. & J. 423; 10 H. L. C. 333; *Siddons v. Short* (1877), L. R. 2 C. P. D. 572;

*Rigby v. Bennett* (1882). L. R. 21 Ch. Div. 559; above, p. 135; *North British Railway v. Turners, Ltd.* (1905), 6 F. 900; *Mews' Digest*, col. 257.

The judgment of the Vice-Chancellor Wood in the North Eastern Railway case, contains an exposition of the whole law on this subject: and, as he points out, the right acquired in this manner would not include a right to the continuance of a state of things, though of long standing, clearly of a temporary and accidental character, as, ex. gr., the additional support to the surface caused by the filling of a mine with water by drowning.

(p) (1859), E. B. & E. 655; 9 H. L. C. 503.

(q) (1878-81), L. R. 3 Q. B. D. 85; 4 Q. B. Div. 162; *Dalton v. Angus*, 6 App. Cas. 740.

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[been occupied as dwelling-houses; that in that year the plaintiffs' predecessor in title had converted his house into a coach factory in such a manner as materially to increase the pressure on the borders of his own soil and consequently on the adjoining property; that this had been done without the express assent of the defendants' predecessor, but openly and without any attempt at concealment; that the defendants had pulled down their house and the wall dividing the two properties without injury to the factory; but that, in excavating in their land for the purpose of providing cellarage (which had not previously existed) for the offices to be built, they had dug below the foundations of the plaintiffs' building without leaving sufficient support, and had thus brought the whole building to the ground.

Trial.

At the trial, Lush, J., directed a verdict for the plaintiffs for the damages claimed, but left them to move for judgment in order to have the questions of law determined.

Motion for  
judgment.

On motion for judgment, it was argued for the defendants, first, that the plaintiffs' factory was not entitled to the support claimed; and, secondly, that the Commissioners were not responsible for the negligence of their contractor.

Upon the second point, the Court considered itself bound by the decision in *Bowyer v. Peate* (r) to find against the defendants; and this finding was ultimately affirmed by the Court of Appeal and the House of Lords. The question so raised is dealt with in a later part of this treatise (s).

But on the first point, which raised the whole question of the law of support, the judges differed. Lush, J., adhering in substance to the view which he had taken at the trial, thought that the plaintiffs ought to succeed; and rested his opinion, partly on the doctrine of the presumption of a grant after twenty years' uninterrupted enjoyment, and partly on an analogy to the Statutes of Limitation. He thought that the decision in *Bonomi v. Backhouse* (t) involved the very point in question. But Cockburn, C. J., held that, if any presumption of a grant was derived from twenty years' user, it was open to be rebutted, and that, when it was proved or admitted that no grant or assent was in fact made or given, the presumption was at an end; and further that, the enjoyment not being capable of being interrupted by

(r) (1876), L. R. 1 Q. B. D. 321.

(s) Below, Book VI. Chap. II.

(t) (1859), E. B. & E. 655; 9 H. L. C. 503.

[any reasonable means, no presumption in fact arose. Mellor, J., agreed with the Lord Chief Justice, and accordingly judgment was given for the defendants.

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acquired by  
twenty years'  
enjoyment.

All the judges agreed that the right to support was not an easement within the Prescription Act.

*Angus v.  
Dalton.*

On appeal (*u*), Brett, L. J., agreed with the majority of the Court below; but Cotton and Thesiger, L. JJ., being of the contrary opinion, the decision was reversed.

Appeal to  
Court of  
Appeal.

Thesiger, L. J., while admitting that the presumption of a lost grant was a presumption, not "juris et de jure," but liable to be rebutted, held that it could not be rebutted by mere proof by the owner of the servient tenement, that no grant was in fact made either at the commencement or during the continuance of the enjoyment; in fact, it "is in the nature of an estoppel by conduct, which, while it is not conclusive so far as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct." The cases of *Barker v. Richardson* (*x*), *Webb v. Bird* (*y*), and *Chasemore v. Richards* (*z*), in which a presumption of this nature had been held to be rebutted, "as direct authorities go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all known easements, will prevent the presumption of an easement by lost grant; and, on the other hand, indirectly they tend to support the view that, as a general rule, where no such legal incompetence, physical incapacity, or peculiarity of enjoyment as was shown in those cases exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, 'Qui non prohibet quod prohibere potest assentire videtur.'" As to the alleged impossibility or extreme difficulty of obstructing the enjoyment of the right of support, he pointed out that this only exists where the servient tenement, being itself covered with buildings, enjoys a reciprocal benefit from the dominant tenement; and in any case he held

(*u*) (1878), L. R. 4 Q. B. Div. 162.

(*y*) (1863), 13 C. B. N. S. 841; above, p. 339.

(*x*) (1821), 4 B. & A. 579; 23 R. R. 400; above, p. 219.

(*z*) (1859), 7 H. L. C. 349; above, p. 285.

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[himself bound by the authorities not to admit the argument as sufficient.

The judgment of Cotton, L. J., was to the same effect.

*Angus v.  
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None of the Lords Justices adopted the view expressed by Lush, J., that the period of twenty years might be limited for the acquisition of a right to support by analogy to the Limitation Acts (a); and none of them seems to have considered that the right might be an easement within the Prescription Act (b).

But although, upon the main question, the majority of the Court of Appeal decided in favour of the plaintiffs' contention, the Court was unanimously of opinion that, the construction of the plaintiffs' factory being somewhat unusual, the jury should have been asked to determine whether the weight which had been put upon the adjoining soil was such as the owner of the soil could be reasonably expected to be aware of, and, on this ground, directed the defendants to elect within fourteen days whether they would take a new trial (c).

Appeal to  
House of  
Lords.

The option was not exercised; and, judgment having been entered for the plaintiffs for 1,943*l.*, the amount of damages assessed by a special referee, the defendants appealed to the House of Lords.

*Dalton v.  
Angus.*

The appeal (d) was, in the House of Lords, twice argued, the second time before seven judges of the High Court who had not yet been parties to any decision in the case (e). The judges, in answering the questions put to them by the House, were unanimous in advising that the judgment of the Court of Appeal was justified by the authorities; and two only of them (f) disapproved of the principle underlying the authorities. But the reasons on which their opinions were based were very diverse. Pollock, B., and Field and Manisty, JJ., did not refer the right to support to any presumption of grant or acquiescence, but treated it as a proprietary right, to be acquired by a *de facto* enjoyment for twenty years; and the first-named expressly approved of the conclusion arrived at by Lush, J., at the trial, that the rule might be derived by analogy from the Statutes of Limitation. On the other hand, Lindley, J. (with whom Lopes, J., agreed), was of

Opinions of  
the judges.

(a) See per Thesiger, L. J., L. R. 4 Q. B. Div. 170, and per Brett, L. J., *ibid.* 199.

(b) *Ibid.* 170, 196.

(c) *Ibid.* 131, 187, 204.

(d) L. R. 6 App. Cas. 740.

(e) Pollock, B., and Field, Lindley, Manisty, Lopes, Fry, and Bowen, JJ.

(f) Lindley and Fry, JJ.

[opinion that support was an easement which, after twenty years' open and interrupted enjoyment, the Court would presume to have been granted, even though it should be proved or admitted that no sealed or written grant had in fact been executed; and that the law which required the servient owner to remove his soil in order to preserve his unrestricted right to let down his neighbour's house, though it did not "commend itself to common sense," was completely established by authority. Fry, J., felt the same difficulty in approving of the principle of the decisions, holding that "an excavation for the sole purpose of letting down a neighbour's house is of so expensive, so difficult, and so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right"; and adding that, as the servient owner cannot, "except by a trespass or an impertinence," ascertain the nature of his neighbour's structure, the incidence of its burden on the soil, or the depth and character of its foundations, the enjoyment is so secret that no right ought to be founded upon it; but he also thought the authorities conclusive against this view being adopted in practice. Lastly, Bowen, J., reverting to some extent to the opinions of the Lord Chief Justice and Lord Justice Brett, treated the twenty years' rule as a "canon of evidence," and held that twenty years' user, peaceful, open, and as of right, was sufficient ground for inferring a lawful origin of the user, and that the inference could only be met by showing that there was no such lawful origin, either at law (as by grant or covenant), or in equity (as by agreement or acquiescence); he thought the decisions showed that the enjoyment was capable of interruption.

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As to the question of notice, upon which the plaintiffs had obtained from the Court of Appeal the option to have the case retried, Lindley, Lopes, and Bowen, JJ., thought that this should have gone to the jury, while the remaining judges considered the question immaterial.

It should be added that Mr. Justice Lindley, in the course of his opinion (g), discussed the important question, whether the enjoyment of support is not after all rather affirmative than negative, and so capable of interruption by the short method of an action of trespass, and, in the absence of interruption, ripening into an easement under the 2nd section of the Prescription Act. "Support," he said, "even when lateral, involves pressure on and an actual use

(g) L. R. 6 App. Cas. at p. 764.



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twenty years'  
enjoyment.

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[of the laterally supporting soil. . . . No trace is to be found in our law books of any action at law or suit in equity based upon any wrong done to the owner of the servient tenement; and the general opinion certainly is, that, in the absence of actual damage to the soil, no such action or suit could be maintained. Upon principle, I confess I do not see why this should be so. If a person builds so near the edge of his own land as to use his neighbour's land to support his house without his neighbour's consent, I do not see why such neighbour should have no cause of action. The enjoyment of light coming across adjoining land, and the enjoyment of the use of such land for support, are in some respects entirely different; for no use is made of a man's property by opening a window on other property near it, and a right not to be overlooked is not recognized by our law. At the same time, in every case in which the right to lateral support is alluded to, it is treated as analogous to the right to light, and the difference to which I have drawn attention has not been dwelt upon or treated as material. Nevertheless, whatever my own opinion would be, looking at the matter theoretically, I am not prepared to say that an action for damages, or an injunction, could be maintained in such a case as I have supposed. The authority against it, although purely negative, would in my judgment, be considered as too strong to be got over. If, however, your lordships should be of a different opinion, I apprehend that it would follow that the Prescription Act (2 & 3 Will. 4, c. 71, s. 2) would apply to and include an easement of lateral support, and the law upon this important subject would then be contained in the provisions of that statute. But all the judges before whom this case has come concur in holding the Prescription Act not to apply; and, in the absence of authority to the contrary, I am not prepared to differ from them.”

On the same subject, Mr. Justice Fry made the following observations in a contrary sense (*h*):—

“It has been argued at your lordships’ bar, that the doctrine (*i*) applies in its simplest form to the right in question; for it has been contended that the act of building a house on one piece of land which derives lateral support from the adjoining soil of a different owner is both actionable and preventible, and that therefore time constitutes a valid bar. Is such a building actionable?

(*h*) L. R. 6 App. Cas. at p. 775.

(*i*) Sc. Qui non prohibet quod prohibere potest assentire videtur.

[I think not. The lateral pressure of a heavy building on soft ground which causes an ascertainable physical disturbance in a neighbour's soil would no doubt be trespass; but no one ever heard of an action for the mere increment caused by reason of a new building to the pre-existing lateral pressure of soil on soil, producing no ascertainable physical disturbance. If that were the law, no one could rightly build on the edge of his land unless he built upon a rock; and yet the building of walls and other structures on the borders of land is universally recognized as lawful. Nay, more, any erection of a house would give a right of action, not only to the adjoining neighbours, but to every owner of land within the unascertainable area over which the increase of pressure must, according to the laws of physics, extend. Such an increase of pressure, when unattended with ascertainable physical consequences, is, in my opinion, one of those minima of which the law takes no heed. The distinction between the principles applicable to water collected into visible streams and that running in invisible ones through the ground, affords a very good analogy to the distinction which I draw between the pressure of an adjoining house which produces a visible displacement of the soil, and that which produces no visible or ascertainable result, but is only a matter of inference from physical science or subsequent experiment.]

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Mr. Justice Bowen's observations on the same point (*k*) appear to indicate that he agreed in principle with Mr. Justice Lindley.

The House of Lords (*l*) unanimously dismissed the appeal; and it is of importance to notice the grounds upon which their lordships' opinions in favour of this course proceeded.

The Lord Chancellor (Lord Selborne), after showing that the right of support to buildings was not a natural but a conventional or acquired easement, expressed his agreement with the views of Lindley, J., and Bowen, J., "that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the super-incumbent land or building to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using

Opinion of  
Lord  
Selborne.

(*k*) L. R. 6 App. Cas. at p. 784.

(*l*) The Lords present were Lord

Selborne, C., and Lords Coleridge, Penzance, Blackburn and Watson.

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[the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.”

From these considerations it followed that the right to support was to some extent affirmative, and so properly the subject, not of covenant only (*m*), but of grant. It was also capable of interruption, if not by action, at least by the removal of the supporting soil; and, if in some cases it did not suit the purpose of the supporting owner to exercise this right of removal, it was the policy of the law that his inaction (whether due to negligence or to his own preponderating interest) should in time confer a possessory title upon his neighbour. The right of support then, being an easement, not purely negative, capable of being granted and also capable of being interrupted, was within the 2nd section of the Prescription Act; and the question of grant or no grant was excluded. And, even though the Prescription Act should not apply, the presumption of a lost grant could not be rebutted by showing that no grant had in fact been made. As to the question of notice, a landowner who sees building operations, or alterations of an existing building, in progress upon the borders of his property, must have imputed to him the knowledge that the building will require fresh support from the adjoining land; and, if everything is done honestly and (as far as possible) openly, he must be fixed with knowledge of the amount of support enjoyed. No question need therefore have been submitted to the jury.

Lord  
Penzance.

Lord Penzance expressed the opinion that, if the matter were *res integra*, it might properly be held that a building owner acquired, immediately upon erecting a house, the right to have it supported by the adjacent soil; but he agreed with Fry, J., in thinking that length of enjoyment could only confer a title

(*m*) See per Littledale, J., in *Moore v. Rawson* (1824), 3 B. & C. 340; 27 R. R. 375.

[through the acquiescence of another, and that an enjoyment which was both secret and incapable of being interrupted without an unreasonable waste of labour and expense, was no evidence of acquiescence, and should not on principle be made the basis of any right. However, he considered that the ruling of Lush, J., was entirely supported by the authorities, and that the appeal should on this ground be dismissed.

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*Dalton v.  
Angus.*

Lord Blackburn thought that the fiction of a lost grant, however introduced, was, not a rule of evidence which a jury might or might not conform to, but an established doctrine of the Court; and that to refuse to administer such a rule, when established, was at least as much an usurpation of legislative authority as it was at first to introduce it. He did not consider that acquiescence or laches was the sole, or indeed the chief, principle on which prescriptive rights were founded. Prescription, or usucapio, was a matter not of natural justice but of positive law, differing in different countries; and the authorities showed that the English law conferred a right after twenty years' enjoyment. The servient owner had notice that some support was required; and this was enough to put him on inquiry.

Lord  
Blackburn.

Lord Blackburn thought it unnecessary to decide the question whether support was within the Prescription Act. But, incidentally, he supplied an answer to the argument drawn by Mr. Justice Fry<sup>(n)</sup> from the impossibility of pushing the doctrine of Mr. Justice Lindley to its extreme limits. "The distinction," he said<sup>(o)</sup>, "between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *Attorney-General v. Doughty* <sup>(p)</sup>, where he observes that, if that was the case, there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, whilst on the balance of convenience and inconvenience it was held expedient that the right of light, which could only impose a burthen upon land very near the house, should be protected where it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement.

<sup>(n)</sup> Above, p. 398.

<sup>(o)</sup> L. R. 6 App. Cas. at p. 824.

<sup>(p)</sup> (1788), 2 Ves. Sen. 453.

Support to  
buildings  
acquired by  
twenty years'  
enjoyment.

*Dalton v.*  
*Angus.*

[And this seems to me the real ground on which *Webb v. Bird* and *Chasemore v. Richards* are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction, the law has always, since *Bland v. Moseley*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement."

Opinion of  
Lord Watson.

Lord Watson agreed with Lord Selborne in holding that the right of support to a building, whether lateral or vertical, was a positive easement; being, as he said, probably influenced by the consideration that a decision that the easement was negative would form an unsatisfactory precedent in Scotland, where positive servitudes alone are capable of being acquired by prescription. He thought that no question of fact need have been submitted to the jury.

Opinion of  
Lord  
Coleridge.

Lord Coleridge did not deliver a detailed opinion, but expressed his concurrence in the judgments of Lords Selborne and Blackburn. He did not say whether he agreed with the former in holding the easement to be a positive one.

The question last referred to must probably be regarded as an open one. It is obvious that a decision, that the enjoyment of support to buildings is a positive act, capable of ripening under the Prescription Act into an easement, and capable of being prevented by the short method of an action by the adjoining owner for trespass, would be of the greatest moment to all owners of immovable property, and would render every building operation a matter of great risk and expense. At present the balance of authority, so far as the number of dicta goes, must be held to be against this view (g).

But the decision of the House of Lords may be taken as finally establishing the rule, that twenty years' enjoyment of support to a building, whether from the adjacent or from the subjacent land, being peaceable, open and as of right, will (either by a right springing out of the enjoyment at the common law, or under the Prescription Act, or under the doctrine of presumed grant) confer the right to have the support continued; that, if the right is

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(g) But see the judgments in *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557.

[based on the presumption of a grant founded on the enjoyment, the presumption is absolute and cannot be rebutted by showing that no grant has in fact been made; and that, if notice be material, then, in the absence of any wilful fraud or concealment, the outward appearance of the building is sufficient notice to all persons concerned of the amount of support which it requires (r).]

Support to buildings acquired by twenty years' enjoyment.

*Dalton v. Angus.*

It may be suggested that there are cases in which, though the house be modern, damages may be recovered for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for his soil, and the jury should be of opinion that the land would have fallen in, in consequence of the digging, even had no additional weight been imposed by building, the value of the house falling with the land might, it seems, be recovered as damage resulting from the principal injury (s).

Some cases in which damages may be recovered though house is modern.

Assuming, however, that a right to the support of the adjacent land has been obtained by the enjoyment of an ancient house, it appears that a condition is imposed upon the party entitled to such support, that he shall do nothing within the period requisite for conferring an easement which shall have the effect of increasing the burthen imposed upon his neighbour. Hence, if an excavation be made near an ancient house, which falls immediately afterwards, "if the building fall in consequence of its infirm condition, that would not be a damage by the act of the

Buildings must be kept in repair.

(r) Compare the judgments of the three Lords Justices in *Union Lighterage Co. v. London Graving Dock Co.*, ubi sup.

(s) See *Wyatt v. Harrison* (1832), 3 B. & Ad. 871; 37 R. R. 566. [This has been decided accordingly in *Stroyan v. Knowles* and *Hamer v. Knowles* (1861), 6 H. & N. 454; and the same principle is recognized by Wood, V.-C., in *Hunt v. Peake* (1860), 29 L. J. Ch. 785; 1 Johns. 705, and by Channell, R., in *Richards v. Jenkins* (1869), 18 L. T. N. S. 437; 17 W. R. 30. In *Manchester Corporation v. New Moss Colliery, Ltd.*, [1906] 2 Ch. 564, it was proved that the subsidence complained of would have occurred to an equal extent if certain works of the plaintiffs had not been erected on the land. An injunction was granted with an enquiry as to damages, but it does not appear that any directions were given as to whether or not the injury to the plaintiffs' works were to

be included in the damages. *Smith v. Thackeray* (1866), L. R. 1 C. P. 564; 35 L. J. C. P. 276, which appears to throw some doubt upon the principle, is commented on in *Att.-Gen. v. Conduit Colliery Co.*, [1895] 1 Q. B. at p. 313; and it is noticeable that in that case *Stroyan v. Knowles* does not seem to have been cited. Damages may also be recovered for letting down a modern house where the person excavating in the adjoining land is not the owner of such land, but a trespasser. *Jeffries v. Williams* (1850), 5 Exch. 792; *Bibby v. Carter* (1859), 4 H. & N. 153. The decision in *Richards v. Jenkins*, ubi sup., appears to rest partly on this ground.

In *Sherbrook v. Tufnell* (1882), 46 L. T. N. S. 886, a right to support for modern houses was held to have been reserved by implication (as an easement of necessity) on a grant of the adjoining land.]

Buildings  
must be kept  
in repair.

[defendant (t)] excavator;" but, even supposing the building to be so far out of repair that, "in the ordinary progress of decay, it would have fallen in a short time," it appears from the decision in *Dodd v. Holme* (u), "that the neighbour had no right to accelerate its fall by removing its support."

No right to  
impose  
additional  
burthen.

It is obvious that if a party claiming such an easement has, during the period of the acquisition of it, done or omitted to do anything to his own house by which its coherence and capacity to stand unsupported is diminished, or if, by excavating his own soil or other means, he has weakened the support before then afforded by his own soil—so that, to enable it to stand, an additional amount of support is required from the neighbouring land—he has thereby imposed an increased burthen upon it, which there has been no ancient user to oblige the neighbour to submit to; and hence it seems to follow that, if the damage sustained would not have accrued but for the modern alteration or neglect of the party claiming the easement, he has no right of action, though his house might have stood had there been no excavation,—as such continuing to stand could only have been caused by receiving a degree of support from the adjoining soil which the owner of it was under no obligation to supply (x). In the case of *Dodd v. Holme* this point does not appear to have been distinctly considered.

Buildings  
must be  
properly  
constructed.

The same reasoning would seem to apply to the case of a house originally built in a weak and insufficient manner, in consequence of which it required a greater degree of support than would be requisite for a well-built house. Unless there was some external indication of the weakness of the building, the neighbour would be altogether in ignorance that a greater degree of lateral pressure was exerted than would have been the case, had the house possessed the ordinary degree of coherence of one well built. [But, in view of the decision in *Dalton v. Angus*, it is doubtful whether anything short of industrious concealment would in such a case deprive the owner of the building of the benefit of the lapse of time (y).]

(t) Per Taunton, J., in *Dodd v. Holme* (1834), 1 A. & E. 606; 40 R. R. 344.

(u) (1834), 1 A. & E. 493; 40 R. R. 344.

(x) [See *Corporation of Birmingham v. Allen*, quoted above, p. 373, n. (d).]

(y) In America some of the States deny any right to prescribe for support

to buildings, as they deny the right to prescribe for light: "Neither in the case of the window opening out on another man's land, or of a building erected on the dividing line, has the owner committed an act against which his neighbour can protest. He has not touched his property, or invaded any

SECT. 3.—*Support to Buildings by Buildings.*

A question of equal practical importance, but presenting greater difficulties and [until recently] not elucidated by any direct authority, arises where the owner of an ancient house claims a right to have it lean against and be supported by the house of his neighbour.

The obstacle to the acquisition of this easement by user arises Clan. from the natural secrecy of the mode of its enjoyment, and the consequent difficulty of showing that it has been had with the knowledge of the owner of the servient tenement. In order to give rise to any question of the existence of this easement, a man must have built to the extremity of his own soil; and supposing him to have built perpendicularly, as he may reasonably be expected to have done, whatever additional pressure may thereby be exerted on the soil, there would be none upon the adjoining house. Supposing, however, that some deviation from the perpendicular should have originally existed, or have been caused subsequently by the imperfect state of the building, but to so small an extent or in such a position as not to be apparent to the owner of the adjoining house, the ignorance of the neighbour would exclude the presumption of that "negligence and patience," from which alone his consent to the imposition of the easement could be inferred.

If, on the other hand, the manner of imposing the pressure be of such a manifest and visible nature as to afford the requisite indication to the adjoining owner, it would appear that an easement of this kind may be acquired in the same manner as any other easements; as, for instance, where a beam is inserted in the wall of the neighbour's house. A further objection would arise from the difficulty on the part of the servient owner in resisting the right thus sought to be acquired.

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right, or given any cause of action. He had a right to use or build on his lot to the farthest limit of his boundary. He has only done this, and he never had any use or possession or enjoyment of any right, corporeal or incorporeal, belonging to another, to which objection could in any form be made; and it would therefore be a mistake, as well as

an abuse, of the terms licence, grant, and acquiescence, to say he has acquired a right by means thereof from the owner of the adjacent lot. . . . It is a mockery to say he might have dug up his land during the period of prescription." Per Trippe, J., in *Mitchell v. Mayor of Rome*, 49 Ga. 19; 15 Am. Rep 669.]



Support to  
buildings by  
buildings.

Clam.

From the expression in the judgment in *Peyton v. The Mayor of London* (z), "it did not appear whether the two houses had been erected at the same time, and whether the freehold in both had originally belonged to the same person," Lord Tenterden seems to have inclined to the opinion that, had such a union existed, an easement of support would have arisen upon their severance; [and to the same effect are the dicta of Lord Justice Thesiger in *Angus v. Dalton* (a) and *Wheeldon v. Burrows* (b)]. Such an acquisition of an easement has obviously no connection with the title by prescription, but rather results from the doctrine of the disposition of the owner of two tenements.

Necessity.

It might also be urged that such a right to support would be an easement of necessity, as, without it, the house granted or retained could not exist (c). The right of support in cases of this nature was distinctly recognized in the civil law (d).

Prescription.

The more ancient authorities appear to be altogether silent upon the point, whether such an easement can be acquired by prescription; and in the first modern case which bears directly upon the subject (e), the declaration was unfortunately so ill drawn that the Court were not called upon to decide the question of right; and, indeed, in argument hardly any attempt appears from the report to have been made to maintain the right to support upon the general principles of the law of easements. The facts of this case, the points made in argument, and the reasons which influenced the Court, sufficiently appear in the judgment delivered by Lord Tenterden.

*Peyton v.  
Mayor of  
London.*

"This was a special action upon the case brought by the plaintiffs, as the reversioners of a house in Cheapside, in the occupation of their tenant under a lease, against the defendants as owners of the adjoining house, for injury sustained in consequence of pulling down the defendants' house. The first count of the declaration, after alleging the plaintiffs' interest in a house which in part

(z) (1829), 9 B. & C. 736; 33 R. R. 311.

(a) (1878), L. R. 4 Q. B. Div. at p. 167.

(b) (1879), L. R. 12 Ch. Div. at p. 59. Cf. the judgment in *Dugdale v. Robertson* (1857), 3 K. & J. 695.

(c) [See *Richards v. Rose*, ante, p. 159; and *Suffield v. Brown* (1864), 4 De G. J. & S. 185; 10 Jur. N. S. 114; 33 L. J. Ch. 249, ante, p. 161.]

(d) *Binas quis ædes habebat unâ con-*

*tignatione tectas; utrasque diversis legavit: dixi, quia magis placet tignum posse duorum esse, ita ut certæ partes cujusque sint contignationis, ex regione cujusque domini fore tigna; nec ullam invicem habituros actionem, "jus non esse immisum habere." Nec interest, pure utrisque, an sub conditione alteri ædes legatæ sint.—Dig. 8, 2, 36, de serv. præd. urb.*

(e) *Peyton v. Mayor of London* (1829), 9 B. & C. 725; 33 R. R. 311.

adjoined a house of the defendants, charged that the defendants unskilfully, wrongfully, and improperly altered, pulled down, and removed their house adjoining to the plaintiffs' house, without shoring up, propping, or duly securing the plaintiffs' house, in order to prevent the same from being injured by the altering, pulling down, and removing of the defendants' house; so that for want of such shoring up, propping, or otherwise duly securing the plaintiffs' house, that house was greatly injured, weakened, and in part fell down. The second count, alleging that the houses adjoined and were connected by a party-wall, charged that the defendants so negligently, unskilfully, wrongfully, and improperly conducted themselves in and about the altering, taking away, pulling down, and removing the defendants' house, that the plaintiffs' house was, by such negligent, unskilful and improper conduct greatly weakened, ruined and dilapidated, and in part fell down.

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buildings by  
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*Peyton v.  
Mayor of  
London.*

"The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which a title to such support can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendants' house, and the manner in which that was done. The first count is evidently framed upon a supposition that it was the duty of the defendants to use the necessary means to sustain the plaintiffs' house when they took down their own; the second count is more general, but it does not charge the want of notice of taking down the defendants' house in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of: and, therefore, in our opinion the action cannot be maintained upon the want of such a notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand; upon which point of law we are not, in this case, called upon to give any opinion.

"I have been thus particular in noticing the declaration, because it furnishes an answer to much of the learned arguments that were advanced on the behalf of the plaintiffs in support of the rule for a new trial.

"At the trial of the cause before me at Guildhall, it appeared upon the plaintiffs' evidence that the two houses were very old and decayed, the party-wall between them weak and defective; that for some time pieces of timber, called struts, have been

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London.*

carried across Honey Lane, on the east side whereof the defendants' house was situate, to the opposite house on the west side of that lane; that the plaintiffs' house adjoined the defendants' eastward; that these struts, by preventing the defendants' house from falling westward, had the effect also of preventing the plaintiffs' house from falling that way; that when the defendants' house was taken down these struts were necessarily removed, and no other and longer struts substituted extending from the plaintiffs' house to the house on the opposite side of Honey Lane, nor any upright shores placed within the plaintiffs' house to sustain the floors and roof without the aid of the party-wall; and if either of these measures had been adopted the plaintiffs' house might have stood; but that, neither of them being adopted, it soon became separated from the house adjoining to it on the east, and either partly fell or was necessarily taken down and rebuilt, being injured, dangerous, and uninhabitable. It did not appear whether the two houses had been erected at the same time, or at different times; from their construction it seems likely that they were built at or about the same time. The freehold was then in different hands; and as the governors of the hospital are not likely to have bought or sold in modern times, it is probable that the freehold was also in different hands when the houses were built. These, however, are but conjectures; if the proof of the facts either way would have aided the plaintiffs' case, it was their duty to give the proof.

"It did not appear that the defendants gave any previous notice of the intention of pulling down their house, or of the time of doing so; but the defective state of both houses was known to the parties. There had been previous discussion between them, especially with regard to the party-wall, and a notice of rebuilding the party-wall under the Act of Parliament had been given, but the defendants' house was pulled down before the expiration of the time mentioned in that notice. The operation of taking down the defendants' house was carried on by day, and the operation must have been seen and known by the tenant and occupier of the plaintiffs' house.

"Upon these facts appearing at the trial, I was of opinion, at the close of the plaintiffs' evidence, that it was their duty to support their own house by shores within; and upon that ground I directed a nonsuit.

"A rule to show cause for setting aside the nonsuit was granted

in the ensuing term; cause was shown, and the matter very well argued on both sides during the present term. We have considered of it; and adverting to the facts proved, and to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, and to the form of the declaration, we think the nonsuit was right, and the rule, therefore, must be discharged" (*f*).

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buildings by  
buildings.

*Peyton v.*  
*Mayor of*  
*London.*

*Brown v. Windsor* (*g*) was an action on the case for negligently and carelessly excavating on the defendant's own land, and thereby withdrawing the support from the plaintiff's house, which the declaration alleged it was entitled to. It appeared that, for about twenty-six years, the plaintiff had rested his house upon a pine end wall belonging to the defendant; this had been originally done by permission of the owner of the wall; the defendant, by excavating near his pine end wall, caused it to sink, and thereby injured the plaintiff's house, which rested against it. The jury found that this excavation was made in a careless and unskilful manner; a motion was afterwards made to set aside the verdict; but, after argument, the Court of Exchequer (*h*) held that the action could be supported.

*Brown v.*  
*Windsor.*

This case cannot be cited as a direct authority upon the point in question, as the Court there clearly assumed that the plaintiff was entitled to the support he claimed: thus, Garrow, B., said: "When such an easement is given, the owner of the premises can only use his rights subject to such easement; and I am of opinion that the allegation as to the easement was established in evidence." "If a party," said Vaughan, B., "grant an easement like the present, and then act so that it cannot be enjoyed, an action lies."

[In the case of *Solomon v. Vintners' Co.* (*i*), the Court of Exchequer seems to have been of opinion that, if a house gets out of the perpendicular and leans on the adjoining house for twenty years, no right of support would be acquired under such circumstances; but that, if the facts of the case had raised the point, they might have decided that it would, in deference to *Stansell v. Jollard*, *Hide v. Thornborough*, and the dicta in *Humphries v.*

*Solomon v.*  
*Vintners' Co.*

(*f*) See also *Walters and others v. Pfeil* (1829), 1 Moo. & Mal. 362; *Massey v. Goyder* (1829), 4 Car. & P. 161; 34 R. R. 782.

(*g*) (1830), 1 Cr. & J. 20.

(*h*) Garrow, B., Vaughan, B., and Bolland, B.

(*i*) (1859), 4 H. & N. 585; above, p. 392.

Support to  
buildings by  
buildings.

*Solomon v.  
Fintners' Co.*

[*Brogden*. It may be observed that these decisions and dicta, referred to by the Court of Exchequer, appear not to refer to a state of things arising from accidental circumstances and from which no grant can properly be implied, as in the case of the support afforded by the drowning of a mine; and that any claim of a right of support arising from an accidental sinking of the house might therefore be disposed of without at all interfering with the authority of the decisions doubted by the Court of Exchequer, or the numerous dicta already referred to in accordance with those decisions.

*Lemaitre v.  
Davis.*

In *Lemaitre v. Davis* (*k*), the plaintiff alleged that the eastern wall of his tenement had for more than sixty years depended for support upon the western wall of the defendant's house, and claimed damages for the loss of this support. Hall, V.-C., held, upon the facts, that the support claimed had been enjoyed, and that the defendants had had actual knowledge of the enjoyment, and decided that the plaintiff had acquired the easement claimed by virtue of the Prescription Act. He could see no sound distinction between the cases of support by land and support by buildings, and therefore thought the case was covered by *Dalton v. Angus*.

This is an express decision that the easement may be acquired by enjoyment alone, provided that the enjoyment be open, peaceable, and as of right; but the analogy to the right of support from the adjacent soil, on which the decision rests, may be thought to be somewhat incomplete, and the case may yet be reviewed by a Court of Appeal.

*Tone v.  
Preston.*

In *Tone v. Preston* (*l*), Denman, J., adopted the principles laid down by Hall, V.-C., in *Lemaitre v. Davis*, but held that in the particular case before him the enjoyment had been precarious.

*Gateley v.  
Martin.*

In *Gateley v. H. J. Martin, Ltd.* (*m*), the plaintiff and a certain company were owners of adjoining houses, numbered 35 and 36 respectively in the same street. The action was brought for the loss of support to the plaintiff's house, caused by the removal by the defendants, who were contractors for the company, of the company's adjoining house. It was found by the jury that the plaintiff's house had uninterruptedly enjoyed support from the adjoining

(*k*) (1881), L. R. 19 Ch. D. 281.

(*l*) (1883), L. R. 24 Ch. D. 739.

(*m*) [1900] 2 Ir. R. 269.

[house for twenty years before the action, but the jury was unable to agree whether such enjoyment was open and notorious.

Enjoyment  
must be open.

*Gateley v.  
Martin.*

The learned judge directed the jury, on these findings, to find a verdict for the defendants, and on such verdict gave judgment accordingly. A motion to set the judgment aside was dismissed, and Palles, C. B., who delivered the judgment of the Court (*n*), after referring to *Lemaitre v. Davis*, and quoting a passage from the judgment of Hall, V.-C., said: "There the enjoyment of the easement was open and known. In the present case there is no evidence to show that it was known, or reasonably could have been known, to the owner of the alleged servient tenement that his house, in fact, afforded support to that of the plaintiff."

In *Union Lighterage Co. v. London Graving Dock Co. (o)*, a right of support was claimed for a dock by means of tie-rods passing under the ground and fastened to piles which were driven into the soil of an adjoining wharf. The dock and wharf had formerly belonged to the same owner, who had put in the tie-rods in 1860. In 1877 the wharf was conveyed to the plaintiffs by the then owners, without any express reservation of a right of support to the dock. In 1886 the same owners conveyed the dock to the defendants' predecessors in title. The defendants claimed the right to support by implied reservation, and also as a prescriptive easement; but it was held by a majority of the Court of Appeal (*p*) that the claim failed on both grounds—as to the claim by implied reservation on the ground that the right claimed was not an easement of necessity, and as to the claim based upon prescription on the ground that the enjoyment had been *clam*. The following passage occurs in the judgment of Romer, L. J.: "Now, on principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment." His lordship referred to the speeches of Lord Selborne, Lord Penzance, and Lord Blackburn in *Dalton v. Angus*.

*Union  
Lighterage Co.  
v. London  
Graving  
Dock Co.*

In the course of the judgment of Stirling, L. J., he remarks: "I think that *Dalton v. Angus* establishes that there must be some

(*n*) Palles, C. B., and Gibson and Madden, JJ.

(*o*) [1902] 2 Ch. 557.

(*p*) Romer and Stirling, L. JJ.

Enjoyment  
must be open.

*Union  
Lighterage Co.  
v. London  
Graving  
Dock Co.*

[knowledge, or means of knowledge, on the part of the person against whom the right is claimed.]”

Vaughan Williams, L. J., who dissented from the judgment of the majority of the Court, whilst recognizing the rule that any right over the tenement granted must be expressly reserved in the grant, thought that the tie-rods formed a corporeal part of the dock, and were reserved with it as being appurtenant thereto. On the question of the prescriptive right, he referred to the remarks of Bramwell, B., in *Solomon v. Vintners' Co.*, to the effect that the enjoyment must be of right, which it cannot be unless openly and visibly enjoyed, and continued: “Bramwell, B., is speaking of a weakly built house gradually coming to lean against some adjacent house. Such support is manifestly not visible in the sense in which the support is upon some structure or some part of an adjacent house which is intentionally appropriated as a means of support. Such a case seems, whatever may be the case where the support is by one house coming in course of time to lean against another, clearly to fall within the Prescription Act (2 & 3 Will. 4, c. 71). In the case of an artificial support, such as there is in the present case, I shall assume, notwithstanding the observations of Lord Blackburn in *Dalton v. Angus*, that acquiescence, and therefore knowledge, or means of knowledge, is the basis of the easement, whether the right of support is based on the Prescription Act or on the fiction of lost grant. I agree, speaking of easements generally, that mere enjoyment is not sufficient to create the prescriptive right. This is only true in respect of the right to light. In order to gain for the owner of the land by enjoyment a title to some advantage from or upon his neighbour's adjacent close, greater than would naturally belong to him, the advantage must be one the enjoyment of which is, or ought to be, known to the neighbour, and could, without destruction or serious injury to his own close, be interrupted by him. See the summary of the first argument in the House of Lords mentioned by Lord Blackburn in his speech in *Dalton v. Angus*. But in the case of easements of support by artificial means, expressly adopted for the purposes, which encroach upon adjacent land by buildings or by structures of any sort, such as the wharf and dock respectively in the present case, I think that the interest of the community, and especially of the inhabitants of large towns, requires that those who occupy adjacent buildings or structures should be taken to be warned of the inherent probability of one building or structure being con-

[nected with and supported by some adjacent structure or building, and that this is especially so in a case where the owner of the alleged servient tenement is aware that that tenement, as well as the alleged dominant tenement, at the time of the construction of the structure on the dominant tenement, belonged to one and the same owner. In such a case it seems to me that a very little ought to put the owner of such a tenement upon enquiry, and that if he makes no enquiry knowledge ought to be imputed to him. He is at least in the possession of knowledge which ought to put him on enquiry. Indeed, it appears both from the passage about the relation of acquiescence to prescription which I have quoted from Lord Blackburn's judgment, and from the summary which I have quoted, that proof of actual knowledge is not essential to acquiescence. It is sufficient if the owner of the servient tenement ought to have known. It is sufficient if he had the means of knowledge. This makes the user open."

Enjoyment  
must be open.

*Union  
Lighterage Co.  
v. London  
Graving Dock  
Co.*

The questions, whether in such cases as that put in the judgment in *Solomon v. Vintners' Co.*, where the tenement actually leans over the boundary of the adjacent property and rests upon the neighbouring tenement, the easement claimed is a negative or a positive easement, and whether any right could be acquired to such an easement under Lord Tenterden's Act, depend upon the same considerations as were advanced in the judgments in *Dalton v. Angus* (q). In these respects, no valid distinction exists between the case where a house actually leans out of the perpendicular upon the adjacent house, and where it is constructed upon a piece of land, so that the removal of the subjacent land must cause its fall.

Whether  
easement  
negative.

It appears from the arguments in some cases to have been supposed that, if the right of support for the soil, or the acquired right of support for buildings thereupon, had been held to be a positive easement giving the owner of the soil a right of action when so much of the adjacent soil had been removed that it could be found as a matter of fact that insufficient support had been left, though no damage had yet actually occurred, then, as the Statute of Limitations must begin to run in respect of that cause of action from the time when such a state of things arose, no right of action would exist for a subsidence occurring more than six years after the removal of the soil which ultimately

Limitation  
of actions.

(q) Above, pp. 396 to 402.



Whether  
easement  
negative.

[caused it. It is hardly necessary to point out that this is not a well-founded notion. For, in the supposed case, the easement of the right of support would be an incorporeal hereditament in fee continuing to exist, and binding the successive owners of the servient tenement; and it never has been suggested that there is no remedy for the present infringement of an existing easement, merely because the owner of it has abstained for six years from bringing an action for a former infringement of it (*r*).

On the other hand questions of great difficulty will arise in the present state of the law in actions for subsidence caused by the acts of persons who have long ceased to be connected with the land (*s*).]

Tigni immit-  
tendi.

Onera vicini  
sustinendi.

By the Civil Law, two servitudes were recognized, the "servitus tigni immittendi," and the "servitus onera vicini sustinendi," both belonging to this latter class of support of one house from the adjoining house (*t*); the former imposed the liability of support alone, while the latter also imposed the anomalous obligation of repair on the servient tenement. But even this, the most oppressive servitude known to the law, allowed the servient owner to pull down his house for the purpose of repair, without propping up the dominant tenement, no matter what danger he thereby exposed it to.

#### SECT. 4.—Negligence (*u*).

Negligence in  
law and in  
fact.

In the cases as to the right of support to land and houses from the soil and buildings adjoining, much stress has been laid upon the negligence imputed to the party charged; and some misapprehension appears to have prevailed, at least in argument, with reference to this point. This has probably arisen from the want of precision in the use of the term negligence, which per se is insufficient to express the distinction between negligence in law and negligence in fact.

Negligence in  
law always  
actionable.

Negligence in law is always actionable, but great uncertainty appears to exist as to the cases in which negligence in fact will afford foundation for a right of action. If a man has a right of

(*r*) See *Darley Main Colliery Co. v. Mitchell* (1886), L. R. 11 App. Cas. 127; and above, p. 374, n.

(*s*) See, e.g., *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Hall v. Duke of Norfolk*, [1900] 2 Ch. 493.

(*t*) Item urbanorum prædiorum servi-

tutes sunt, ut vicinus onera vicini sustineat; ut in parietem ejus liceat vicinigenum immittere.—Inst. 2, 3, 1. Vide post, Incidents of Easements.

(*u*) [As the law of negligence is only indirectly connected with the subject-matter of this treatise, only such references have been added as relate closely to the law of easements.]

easement in a support, and his neighbour invades it, he is liable to an action—no matter how carefully he may have done the act complained of; but it is by no means equally clear, where a party is not bound by any easement, that he may not be liable for the damage resulting from his negligence in fact (x).

Negligence in law and in fact.

Not clear whether negligence in fact may not be so.

The first branch of this proposition appears sufficiently obvious. It has been recognized as law in many ancient decisions that an action lies for any act done by a man in using his own property, whereby the rights of another are injured, unless such act be altogether inevitable and beyond his control (y).

Negligence in law.

The civil law appears to agree with these authorities: "If from the roof of a house, tiles thrown down by the wind should cause damage to a neighbour, the owner of the house is liable, if it happen through any defect of the house; but not if it happens through the violence of the winds or other act of God—quâ aliâ

Civil law.

(x) [In the old digests, under the head of actions on the case for negligence, are ranged instances of neglect or breach of duty, in which the proper question for the jury would be simply whether the defendant had done or omitted to do some act, or some result was the consequence of his act, and not whether he had been guilty of negligence. In such cases it was the practice, in conformity with the precedents (see, however, *Smith v. Martin*, 2 Wms. Saund. 400), to allege negligence in the declaration, partly, perhaps, to show that the count was in case not trespass, partly because of the unsettled state at the time of the law upon the subject. But it is now clear that the allegation of negligence is unnecessary in such cases. Thus in *Bibby v. Carter* (1859), 4 H. & N. 153, a count for taking away support was held good on demurrer, though negligence was not alleged; and in *Humphries v. Brogden* (1848), 12 Q. B. 739, the count alleged negligence, and, though negligence was not proved, the plaintiff was held to be entitled to recover on it. "If the plaintiff was entitled to the support of the defendant's land, and was deprived of it, the absence of negligence is immaterial." *Brown v. Robins* (1859), 4 H. & N. 193, per Martin, B. See acc. *Hamer v. Knocles* (1861), 6 H. & N. 454; S. C., 30 L. J. Exch. 102; *Hunt v. Peake* (1860), 29 L. J. Ch. 787, per Wood, V.-C.

The author's heading of "Negli-

gence in Law" appears to include two classes of cases: (1) cases of trespass and of disturbance of easements, and (2) breaches of absolute duties attached to certain circumstances, such as the custody of fire or other dangerous substances. Neither class necessarily involves negligence in the popular sense of the word.]

(y) In the earlier editions of this treatise this passage was illustrated by reference in the text to the following authorities: 6 Edw. 4, 7, pl. 18, cited in *Scott v. Shepherd* (1783), 2 W. Blackst. 895; 1 Sm. L. C. (11th ed.) 454; its effect stated in *Smith v. Kenrick* (1849), 7 C. B. 563; *Weaver v. Ward*, Hobart, 134; 1 Rolle's Abridg. tit. Action sur Case, B. p. 1; *Turberville v. Stampe* (1698), 1 Lord Raymond, 264; Com. 32; 1 Salk. 13; 12 Mod. 151; Skin. 281; Cases temp. Holt, 9; Carth. 425; Comb. 459 (M. 9, W. 3); Comyns' Digest, Action upon the case for misfeasance, A. 4; *Sutton v. Clarke* (1815), 6 Taunt. 44; 16 R. R. 563; *Laughan v. Menlove* (1837), 4 Scott, 244; S. C., 3 Bing. N. C. 468; 43 R. R. 711; Preface V.

None of these authorities, however, deals directly with the subject of easements, and it is thought unnecessary to retain a discussion of them in the text. Upon the question, see Broom's Legal Maxims (7th ed.), p. 281, "Sic utere tuo ut alienum non lædas."

Negligence  
in law.

Civil law.

ratione quæ vim habet divinam." And the reason is given for the limitation of this rule: "Without this restriction the law would be unjust; for it is impossible to make a building so strong as to resist the force of a river, the sea, a tempest, a fire, or an earthquake" (z). The only exception mentioned in another place is inevitable accident (a). This is expressed in our law by the maxim, "Sic utere tuo ut alienum non lædas"—a maxim equally applicable to an easement, when once legally acquired, as to any of the rights of property instanced in these decisions. It can scarcely be contended that the careful manner in which a wall was built could be any defence for the obstruction of an ancient window, if such be the consequence of its erection; or that an excavation, which caused the fall of an ancient house, could be justified on the ground that all possible precaution was taken to guard against such an accident.

Negligence  
in fact.

The further question remains to be considered, whether a man acting in the exercise of his undoubted rights of property, and doing damage to his neighbour which under some circumstances might be justifiable, is liable to an action if the damage might have been prevented by the use of reasonable care and precaution on his part.

This question also turns upon the application of the maxim, "Sic utere tuo ut alienum non lædas"; and as it is not contested that, in the interpretation of this maxim, "alienum" must be taken to mean "the rights of the neighbouring owner," and that, therefore, no action can be maintained unless both injury and damage are sustained, the real point to be decided is—whether, in the absence of any easement restricting the neighbouring owner, a party has a right to impose upon such owner a limitation as to the mode of doing a thing, which is one of the undoubted rights of property, and the performance of which he clearly has no right to prevent.

(z) Servius quoque putat, si ex ædibus promissoris vento tegulæ dejectæ damnum vicino dederint, ita eum teneri, si ædificiæ vitio id acciderit, non si violentiâ ventorum, vel quâ aliâ ratione, quæ vim habet divinam. Labeo et rationem adjicit: quod si hoc non admittatur, iniquum erit: quod enim tam firmum ædificium est, ut fluminis, aut maris, aut tempestatis, aut ruinæ, incendii, aut terræ motûs vim sustinere possit.—Dig. 39, 2, 24, § 4, de damno infecto.

(a) Cassius quoque scribit, quod contra ea damnum datum est, cui nullâ ope occurri poterit, stipulationem non tenere.—Ibid. § 8.

Si damni infecti ædium nearum nomine tibi promisero, deinde hæ ædes vi tempestatis in tua ædificia ceciderint, eaqua diruerint, nihil ex eâ stipulatione præstari; quia nullum damnum vitio nearum ædium tibi contingit; nisi forte ita vitiosæ mæ ædes fuerint, ut quilibet vel minimâ tempestate ruerint. Hæc omnia vera sunt.—Ibid. § 10.

"If a man sustains damage," says Bayley, J., "by the wrongful act of another, he is entitled to a remedy; but, to give him that title, these two things must concur—damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient." *Rex v. Commissioners of the Pagham Level* (b).

Negligence  
in fact.

Damnum et  
injuria must  
concur.

Thus, supposing there were two modern houses, and the owner of one were desirous of pulling down his house, the consequence of which, if done in the most convenient and economical manner, would be damage to the neighbouring house, by suddenly withdrawing the support which it had hitherto received, but to which it had no claim; while a more gradual withdrawal of the support might not have been attended with the same danger;—has the neighbouring owner any right of action against him if he do not adopt the latter mode?

Some modern authorities would appear to answer this question broadly in the affirmative, and to lay it down as being in every case at large for the decision of the jury, whether a reasonable degree of caution has been exercised. The inconvenience that must result from the absence of some more precise and definite rule of law is obvious. A man could scarcely exercise upon his own land one of the most ordinary rights of property without exposing himself to an action for damages: the event of which would depend upon the varying opinion of a jury, founded on the proverbially conflicting testimony of surveyors (c).

Vagueness of  
doctrine.

As the case put supposes that no easement has been acquired, the party must have been in the enjoyment of that to which he had, by law, no title, and which enjoyment the neighbouring owner might at any time have determined by his own act (d).

Where, however, a party chooses to obtain a remedy by his own act, without having recourse to law, a condition is imposed upon him, that he shall use no unnecessary violence. If, therefore, a beam be wrongfully inserted into a neighbouring house, or the outer walls cohere either from the cement or the bricks dovetailing, the party proposing to remove the beam or the bricks improperly inserted in his wall must use no unnecessary violence; and in this

Care in  
removing en-  
croachments.

(b) (1828), 8 B. & C. 355; 33 R. R. 406; [and the notes to *Ashby v. White*, 1 Smith, L. C., 11th ed. p. 240].

(c) *Walters v. Pfeil* (1829), 1 Moo. & M. 362; *Trower v. Chadwick* (1836), 3

Bing. N. C. 334; 3 Scott, 699; 43 R. R. 659.

(d) [*Gayford v. Nicholls* (1854), 9 Exch. 708.]

Negligence  
in fact.

Care in  
removing en-  
croachments.

respect it must obviously be immaterial whether his object be simply to resist the usurpation, or, in addition thereto, to remove his whole building, either with or without an intention to reconstruct it.

Beyond this, it appears difficult to see on what principle any restriction can be imposed upon a party in the free use of his own property, so long as he confines himself strictly within its limits (e). There are, however, cases which have been adduced as authorities opposed to this doctrine, such as the case in which air has been corrupted by gas and other works; but in these instances there is a clear invasion of common right: and, therefore, the analogy seems to fail. A man requires an easement to entitle him to the lateral passage of light and air; but he requires no easement to give him a right of action against his neighbour who immits upon his land air in a corrupted state, and thus commits a quasi trespass upon him. The real ground of action in this case is not what he does on his own, but what he does on the complainant's land; not the rendering the air impure, but the transmitting it in that state to his neighbour (f).

*Walters v.*  
*Pfeil.*

In *Walters v. Pfeil* (g), it appeared that the plaintiffs or their tenants had neglected to take any precaution, by shoring up their houses within, or in any other way, against the effects of pulling down the defendant's house adjoining; and it appeared that this might have been so done, and that the accident would not in that case have happened to the same extent. There was, also, evidence to show that the accident was owing to the bad foundations of the plaintiffs' houses; but there was conflicting evidence as to whether, by due care on the part of the defendant's workmen, the mischief might have been entirely avoided.

(e) See *Davis v. London and Blackwall Rail. Co.* (1840), 1 M. & G. 799; and *Bradbro v. Christ's Hospital* (1842), 4 M. & G. 714. See the judgment of Tindal, C. J., in the latter case on the thirteenth objection. "The declaration charges the defendants with conducting themselves so carelessly, negligently, and improperly, in pulling down their house, and in neglecting to use proper precautions in that behalf, that large quantities of brick, mortar, &c. fell from the defendant's house into and upon the plaintiff's house, broke the windows, &c." "The plaintiff, therefore, complains not of some mere omission on the part of the

defendants, but of their doing certain acts in so negligent a manner that by those very acts the plaintiff's house was injured." So in *Davis v. The Blackwall Rail. Co.*, the charge was that the defendants caused a house to fall against the plaintiff's. [In *Le Lievre v. Gould*, [1893] 1 Q. B. at p. 497, Lord Esher, M. R., said: "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."]

(f) [Cf. as to impure water, *Ballard v. Tomlinson* (1885), L. R. 29 Ch. Div. 115.]

(g) (1829), Moo. & Malk. 362.

Lord Tenterden, C. J., in summing up, said: "It is now settled that the owner of premises adjoining those pulled down must shore up his own in the inside, and do everything proper to be done upon them for their preservation. That has not been done here; and it seems that if it had been, it would have given security. Still the omission does not necessarily defeat the action; if the pulling down be irregularly and improperly done, and the injury is produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought for his own protection. If, therefore, you think that the house of the defendant was pulled down in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the plaintiffs than in the ordinary course of doing the work they would have incurred, then I think the defendant liable to make compensation for the consequences of his want of caution; if you think that fair and proper caution was exercised, then the defendant will be entitled to a verdict."

Negligence  
in fact.

*Walters v.  
Pfeil.*

In *Dodd v. Holme* (h), the action was brought for digging the foundations of an intended building on a piece of land next adjoining an adjacent house of the plaintiffs', so carelessly, &c., that the walls and foundations of the plaintiffs' ancient house sank and gave way: the other counts were similar—and all, except the last, stated it to be an ancient house. At the trial it appeared that the house was ancient, and that the defendants excavated on their own ground, being about four feet from the plaintiffs' house. After the excavation, the plaintiffs' gable wall bulged—the defendants made an ineffectual attempt to shore it up, but it gave way in all directions, and it became necessary to rebuild it. On the part of the plaintiffs evidence was given, that if the wall had been shored properly, and in time, it would not have given way. On the part of the defendants evidence was given, that the wall was in so rotten a state that it could not have been effectually shored, and was pressed upon by a great weight of rubbish on the plaintiffs' premises, and that, even if undisturbed, it could not have stood six months. It appears, also, to have been contended, that if a man build to the extremity of his own land, antiquity of possession would not give him any right "to prevent a neighbour

*Dodd v.  
Holme.*

(h) (1834), 1 A. & E. 493; 2 Nev. & Man. 739; 40 R. R. 344. [As to this case, see the observations of the Court in *Humphries v. Brogden* (1850), 12 Q. B. 749; 76 R. R. 402; and in *Gayford v. Nicholls* (1854), 9 Exch. 708.]

Negligence  
in fact.

*Dodd v.  
Holme.*

from using his own land lying adjacent." The learned judge stated the law to be as follows:—

"If I have a building on my own land, which I leave in the same state, and my neighbour digs in his land adjacent so as to pull down my wall, he is liable to an action. If, however, I had loaded my wall so that it had more on it than it could well bear, he would not be liable." And he stated the question for the jury to be, "whether the fall was occasioned by the defendants' negligence or by its own infirmity, in which latter case they should find for the defendants." The jury found a verdict for the plaintiffs. In Michaelmas Term following a new trial was moved for, on the "ground that the learned judge had misdirected the jury, inasmuch as they might have been led by the summing-up to suppose, that the mere act of digging near the plaintiffs' land, in consequence of which the wall fell, was negligence, for which an action lay, unless the wall was improperly loaded; whereas the real question was, whether the work had been done by the defendants in a negligent manner, or with as much care as the circumstances allowed: it was also contended that it should have been left to the jury, whether the house was built in such a manner as a man ought to build a house at the extremity of his own land, in order to have an action against his neighbour, if any such action would lie, for injury occasioned to the house by the neighbour digging in his own soil." A rule nisi having been obtained, in the course of the argument it having been denied that the antiquity of the house gave any right to support from the adjoining soil, Little-dale, J., observed, "Suppose the house to have been substantially built, to have stood thirty or forty years, and to have been kept in proper repair, do you say, that if the defendant, by excavating his adjacent ground, let down that house, though without actual negligence on his part, an action would not lie against him?" The rule for a new trial was discharged. The judgments of the judges were as follows:—

"Lord Denman, C. J.: The case, as presented to the Court, involves some curious points, which, however, it is not necessary to decide. The declaration charges that the plaintiffs were possessed of a house, and that the defendants so negligently and carelessly dug their foundations in the land next adjoining the land on which the said house was built, that the walls thereof sank and gave way. The question is—if those allegations were proved, and if it was properly left to the jury whether they were

or were not proved. The real point in the case was, the cause of the damage sustained by the plaintiffs. It is impossible not to see that the question, what that cause was, involves the consideration of the state in which the plaintiffs' house was at the time of the act done by the defendants. Upon that subject a great deal of evidence was given, and, no doubt, properly impressed upon the jury; and I think it was substantially left to them in the charge of the learned judge, whether or not the result complained of was caused by the negligent act of the defendants. It being so left to them, I think, upon the balance of evidence, no other result could have been expected than the verdict they gave; the damage having occurred so soon after the act complained of. A man has no right to accelerate the fall of his neighbour's house. Without, therefore, entering into the general question of law as to the right of a party building on the edge of his own soil, or the question whether twenty years' occupation is an essential part of such right, on which I give no opinion, I think the question in this case was fairly left to the jury, and the verdict a proper one.

Negligence  
in fact.

*Dodd v.  
Holme.*

"Littledale, J.: I think that the plaintiffs' house, having stood more than twenty years, might be considered as an ancient house. What difference that might make under other circumstances, it is unnecessary now to say: the plaintiffs had, at all events, acquired certain rights; and the complaint in this action is, that the defendants, by their negligence, occasioned a loss to the plaintiffs, which was a prejudice to those rights. The learned judge appears, by his report, to have put the case to the jury in language like that used by this Court in their judgment in *Wyatt v. Harrison* (i). I do not find that he left it prominently as a question, what was the state of the building; but that must have been a matter submitted to them; for, in inquiring whether the injury was owing to the neglect of the defendants, the state of the premises must have been a part of the consideration. I am of opinion that there is no ground for a new trial.

"Taunton, J.: The question in the cause was merely one of fact, and I cannot see in what respect the jury have drawn a wrong conclusion. In every count of the declaration it is stated that the defendants did the act complained of negligently, care-

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(i) (1832), 3 B. & Ad. 871; 37 R. R. 566.



Negligence  
in fact.

*Dodd v.  
Holme.*

lessly, and unskilfully, and that by reason thereof, that is, of such negligent and improper conduct, the damage was occasioned. A very long inquiry was gone into at the trial, how far the defendants had acted negligently or carelessly, upon which the jury have formed their conclusion; and they must be taken to have decided, according to the averments in the declaration, not only that there was negligence in the defendants, but that, by reason of such negligence, the damage accrued. It was said, that the house, if undisturbed, might not have stood six months; but if that was so, still the defendants had no right to accelerate its fall: six months' enjoyment was of some value, and the defendants had no right to deprive the plaintiffs even of that short-lived existence of their dwelling-house. If the building had fallen down merely in consequence of its infirm condition, that would not have been a damage by the act of the defendants; but the jury have found otherwise, and I think the evidence supports their finding. As to the summing-up, the learned judge has stated it briefly in his report, and may not recollect every observation he made; but, considering the length of time occupied by the cause, and the quantity of evidence gone into, it is impossible, even if the judge had been silent on the point, that the jury should have omitted to consider whether or not the act of the defendants was done by them negligently: and, without looking narrowly, and, as Lord Kenyon used to say, 'with eagles' eyes,' at the words used by the learned judge, I think we are justified in saying, that the minds of the jury were sufficiently directed to the question how far the damage complained of arose from the improper act of the defendants.

"Williams, J.: I am of the same opinion; and I think it is clear from the learned judge's report, that the attention of the jury was drawn to that which was the real subject of inquiry. Much evidence was given to show that the injury was occasioned by the faulty state of the house, and not by the negligent proceeding of the defendants; that question must have been fully before the jury, and there was nothing in the summing-up to withdraw it from their notice. The bad condition of the house would only affect the amount of damages. If it was true that the premises could have stood only six months, the plaintiffs still had a cause of action against those who accelerated its fall: the state of the house might render more care necessary on the part of the defendants not to hasten its dissolution. There was evidence of

an actual neglect in them; and, upon the whole, there is reason to think that the jury drew the proper inference."

Negligence  
in fact.

The [more] recent case of *Trower v. Chadwick* (*k*) supports the first principle above laid down (*l*), and negatives the existence of the liability of a party for his negligence in fact, apart from the invasion of an easement. The judgment [of the Court of Common Pleas] on the second count in this case is to the effect, "That, although a man may have no right to support from the buildings of his neighbour, yet, if the latter chose to withdraw it, he must take reasonable and proper care in doing so, and, for negligence and unskilfulness in doing so, he is liable to an action." But this judgment was reversed in the Exchequer Chamber (*m*). That Court was decidedly of opinion that a man was under no obligation towards his neighbour to use any care in dealing with his own property, where he had no notice of the existence on his neighbour's land of structures which might be injured by acts done on his own; and the Court certainly did not say anything to indicate that any such obligation would exist by law if notice had been given. The judgment of the Court (*n*) was delivered by Parke, B., as follows:—

*Trower v.*  
*Chadwick.*

*Chadwick v.*  
*Trower.*

"We are unanimously of opinion that the judgment of the Court below must be reversed. The question arises upon the second count of the declaration, which states that the plaintiffs were possessed of a certain vault and of certain wine therein, and that the defendant was about to pull down and did pull down and prostrate certain other vaults and walls next adjoining the vault of the plaintiffs: the count then goes on to state that thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' walls, to give due and reasonable notice to the plaintiffs of his, the defendant's, intention to pull down his vaults and walls, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves. It then goes on to allege another duty in the defen-

(*k*) (1836), 3 Bing. N. C. 334; S. C. 3 Scott, 699; 43 R. R. 659; [reversed in error (1839), 6 Bing. N. C. 1; S. C. 8 Scott, 1; 43 R. R. 676; Preface VI. In the Exchequer Chamber the validity of the first count was not questioned, and the Court held the second count to be bad, and therefore, there having been a trial

of the cause, and a general assessment of damages, granted a venire de novo].

(*l*) Above, p. 414. *et seq.*

(*m*) (1839), 6 Bing. N. C. 1; S. C. 8 Scott, 1; 43 R. R. 676; Preface VI.

(*n*) Parke, B., Patteson, J., Williams, J., Gurney, B., Coleridge, J., and Maule, B.

Negligence  
in fact.

*Chadwick v.  
Trower.*

dant, viz., to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, &c., so adjoining the plaintiffs' vault, so that, for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed or the plaintiffs be injured in respect thereof; and it then proceeds to allege as a breach that the defendant wrongfully and injuriously pulled down, prostrated, and destroyed the vaults, &c., so adjoining the plaintiffs' vault, without giving them due or reasonable or other notice of his, the defendant's, intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' vault, and the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down or prostrating or removing the vaults, &c., so adjoining the plaintiffs' vault, upon that occasion, according to his said duty. And a general verdict has been found for the plaintiffs, with general damages.

"The plaintiffs do not in this count allege any right to have their vault supported by the vaults or walls of the defendant; therefore no *right* of theirs has been injured by the act of the defendant. The duty to give notice is charged as one arising from the contiguity of the defendant's vault to that of the plaintiffs. No doubt can be entertained as to the opinion of the Court of Common Pleas upon this question. The Lord Chief Justice, in delivering the judgment of the Court, says: 'There is no allegation in this count of any right of easement in alieno solo, which forms the ground of the plaintiffs' action in the first count. And, as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it up himself, it is objected, *and we think with considerable weight*, that no such obligation results, as an inference of law, from the mere circumstance of the juxtaposition of the walls of the defendant and the plaintiffs. We also think it is impossible to say that under such circumstances the law imposes upon a party any duty to give his neighbour notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantive ground for damage: and the probability is, that the main damage did result from the want of notice; for it is obvious, that if notice had been given, the plaintiffs might have taken pre-

cautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think the judgment must be arrested, and a venire de novo awarded.

Negligence  
in fact.

*Chadwick v.  
Trower.*

“But, supposing that the improperly pulling down the defendant’s vaults and walls may be treated as the substantive cause of action, and that the second branch of the argument that has been urged on the part of the plaintiffs is well founded (which we think it is not), then the question arises, whether any such duty as that which is alleged to have been violated is by law cast upon the defendant. The duty alleged to be cast upon the defendant by reason of the proximity of his premises to those of the plaintiffs, is, ‘to use due care and skill, and to take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, buildings, and walls adjoining the plaintiffs’ vault, so that for want of such care, skill, and precaution, the vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof’; and the breach alleged is, ‘that the defendant did not nor would use due care or skill, or take due, reasonable, or proper precaution in or about the pulling down, prostrating, or removing the said vaults, buildings, or walls so adjoining the said vault of the plaintiffs, according to his duty.’ The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognizant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence; for one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think no such obligation as that alleged exists in the absence of notice. And, therefore, upon this ground also we think the count is bad; and consequently there must be a venire de novo.”

The language of Lord Tenterden in *Walters v. Pfeil* evidently applies to the case of a usurpation having taken place, as other-

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wise there could be no necessity for shoring; the same observation applies to *Trower v. Chadwick*; while, from the variety of points which combined to form the judgment of the Court in *Dodd v. Holme*, it can hardly be advanced as a decision upon this precise point.

*Harris v.  
Ryding.*

In the later case of *Harris v. Ryding* (*n*) there had been a reservation of the minerals under the land, and the defendant removed them in such a negligent manner that the surface of the earth fell in. In this case it is obvious, and it appears to have been so admitted, that there existed the natural right of support for the upper soil from the soil beneath; and therefore the entire removal of the inferior strata, however done, would be actionable if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled. It was a clear violation of the duty of the subjacent owner to do no act whereby the enjoyment of the surface could be interfered with (*o*).

No duty to  
give notice.

Upon the amount of caution required in cases where no easement exists depends the question, whether it is the duty of a party intending to make alterations which may affect his neighbour's premises to give notice of his intention (*p*). The judgment in error in *Trower v. Chadwick* has decided that there is no obligation to give such notice (*q*).

The general rule of law upon this subject is thus laid down by Bracton:—

“Nocumentum enim poterit esse justum, et poterit esse injuriosum. Injuriosum ubi quis fecerit aliquid in suo injustè—contra legem vel contra constitutionem, prohibitus a jure. Si autem prohibere a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriosum, licitum est enim unicuique facere in suo quod damnum injuriosum non eveniet vicino” (*r*).

*Semble.* Not  
actionable  
where no  
easement  
exists.

“An action does not lie for an act not prohibited by law; as if a lessee at will, by his negligence, burn his house, an action on the case does not lie (at the suit of the landlord), for the law does not punish him for permissive waste” (*s*); if, however, the fire be transmitted beyond the bounds of his property, and communi-

(*n*) (1839), 5 M. & W. 60.

(*o*) [See the account of this case given by the Court in *Humphries v. Brogden* (1848), 12 Q. B. 739.]

(*p*) See *Massey v. Goyder* (1829), 4 Car. & P. 161; 34 R. R. 782.

(*q*) *Chadwick v. Trower* (1839), 6 Bing.

N. C. 1; S. C., 8 Scott, 1; 43 R. R. 676, Preface VI. [See *Fairbrother v. Bury Rural Sanitary Authority* (1889), 37 W. R. 544.]

(*r*) Lib. 4, f. 221 a.

(*s*) *Countess of Shrewsbury's Case* (1738), 5 Rep. 13 b.

cate to the adjoining house, he would have been liable at common law (f).

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Subject to the restriction already mentioned, that an encroachment must not be removed with unnecessary violence, there seems nothing to take this class of cases out of the rule before adverted to—"That a party confining himself within the limits of his own property may deal with it as he will" (u). If he dig a pit he is not bound to put a fence round it to keep trespassers from falling into it (x).

The seeming exception to this rule, arising from the prohibition to use dangerous instruments or animals for the protection of premises without notice, depends upon the principle, that a man shall not do that indirectly which he cannot do directly; and as such means of offence would be calculated to do more injury than he would be justified in using to defend his possession against trespassers, he shall not be allowed to do so unless he gives such

Dangerous  
animals.

(f) *Turberville v. Stamps*, ante, p. 415, n. (y).

(u) [This view is supported by *Gayford, App., Nicholls, Resp.* (1854), 9 Exch. 702, in which, the plaintiff being in part for negligently taking away the support of a modern house, the judge was held to have misdirected the jury in leaving to them the question of negligence. In several modern text-books, not including *Wms. Saund.* (see vol. 2, 400, n. (a), of that invaluable work, 2 *Notes to Saund.* 802), it is laid down, without further authority than the cases above distinguished, by the learned editors, that an action is maintainable against a landowner for negligence in removing the support afforded by his land to the modern house of his neighbour. This may to some extent be attributable to vagueness in the use of the relative term negligence (per *Erle, C. J.*, 29 L. J. C. P. 319; *Bramwell, B.*, 1 H. & N. 251; 3 H. & N. 318; *Watson, B.*, 28 L. J. Exch. 250), of which a definition is given by *Alderson, B.*, in *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 784; and *Willes, J.*, *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 687, 688. It should seem that, in this class of cases, if the mere removal occasions the fall, the defendant is not liable, however negligent may have been the manner of the removal—for his act was confined to his own land; but if it was not merely the removal or omission to do things to prevent its effect, but the manner of

the removal, which caused the fall, then he is liable—for then of necessity his act must have extended beyond his own land, and the force proceeding from it must have entered the plaintiff's land, and actively created there the motion which produced the fall.]

(x) 1 Roll. Abr. 88, pl. 4; fully supported in *Jordin v. Crump* (1841), 8 M. & W. 788; [but qualified by *Barnes v. Ward* (1850), 9 C. B. 392; 82 R. R. 375, to the extent that if the pit abuts on a highway and renders the highway dangerous to persons passing along it with ordinary care, then the occupier is bound to fence it. Cf. *Stone v. Jackson* (1855), 16 C. B. 199; *Hurst v. Taylor* (1885), L. R. 14 Q. B. Div. 918. This is on the ground that such pit is a public nuisance, interfering with the use of the way. But if the pit or other excavation be not substantially adjacent to the way, there is no obligation to fence it, and no action is maintainable against the owner of the land, if a person accidentally or otherwise straying off the way falls into the pit: *Hardcastle v. South Yorkshire Rail., &c. Co.* (1859), 4 H. & N. 67; *Hounsell v. Smyth* (1860), 7 C. B. N. S. 731; S. C., 29 L. J. C. P. 203. As to the responsibility of an occupier of premises for injuries occasioned by the defective state of the premises to persons there with his leave, the reader is referred to the text-books dealing with the general subject of Negligence.]

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in fact.

notice as makes the party fully aware of the danger he is rushing upon, and the damage sustained by him clearly the consequence of his own act (y).

Public  
officers.

The cases in which parties acting in a public capacity, and under the limited authority conferred by their office, have been held liable for the injurious consequences of their want of care, do not afford any authority upon this subject (z). Whether they are liable for not taking due and proper precautions in doing the acts they are authorized to do, or liable only if they have not acted to the best of their skill and judgment, the principles already adverted to do not appear to apply to them.

*Jones v. Bird.*

In the case of *Jones v. Bird* (a), an action was brought against the Commissioners of Sewers for negligently making sewers near the plaintiff's houses, whereby the foundations thereof were weakened, and the walls fell down. It appeared that the sewer, which it was necessary to repair, ran immediately adjoining the plaintiff's houses, with a stack of chimneys belonging to one of the

(y) [See the judgments in *Deane v. Clayton* (1817), 7 Taunt. 489; 18 R. R. 553, Preface VI.; *Ilott v. Wilkes* (1820), 3 B. & A. 304; 22 R. R. 400, Preface VII.; *Bird v. Holbrook* (1828), 4 Bing. 635; 29 R. R. 657, Preface IX. It is now illegal to set a spring-gun or a man-trap except at night and in a dwelling-house: 24 & 25 Vict. c. 100, s. 31. As to the responsibility of a person bringing "water, stench, or filth" on to his land for all consequences arising from its escape, see *Fletcher v. Rylands* (1866), L. R. 1 Exch. 265; 1 Smith, L. C. 11th ed., p. 810; and Pollock on Torts, 7th ed., p. 475.]

(z) [See *Stainton v. Woolrych* (1856), 23 Beav. 225; S. C., 26 L. J. Ch. 300.]

(a) (1822), 5 B. & A. 837. [This and the two next cases mentioned in the text will suffice to illustrate the distinction pointed out by the learned author. For more recent authorities upon the subject, see *Whitehouse v. Fellowes* (1861), 10 C. B. N. S. 765; *Ruck v. Williams* (1858), 3 H. & N. 308, and the cases there cited; *Southampton and Itchin Bridge Co. v. Local Board of Southampton* (1858), 8 E. & B. 801; *Metcalf v. Hetherington* (Cam. Scac.) (1860), 5 H. & N. 719; *Piggot v. Eastern Counties Rail. Co.* (1846), 3 C. B. 229; *Vaughan v. Taff Vale Rail. Co.* (Cam. Scac.) (1860), 5 H. & N. 679; *Cowley v.*

*Mayor, &c. of Sunderland* (1861), 6 H. & N. 565; *Whitehouse v. Birmingham, &c. Canal Co.* (1857), 27 L. J. Exch. 25; *Manley v. The St. Helens Canal, &c. Co.* (1858), 2 H. & N. 840; *Great Western Railway of Canada v. Braid* (1863), 1 Moo. P. C. N. S. 101; *Mersey Docks Trustees v. Gibbs* (1864), L. R. 1 H. L. 93; *Hammermith Rail. Co. v. Brand* (1868), L. R. 4 H. L. 171; *Smith v. L. and S. W. R.* (1870), L. R. 6 C. P. 14; *Dunn v. Birmingham Canal Co.* (1872), L. R. 8 Q. B. 42; *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193; *Truman v. L. B. & S. C. R.* (1883), L. R. 25 Ch. D. 423; sub nom. *L. B. & S. C. R. v. Truman*, 29 Ch. Div. 89; 11 A. C. 45; *Evans v. Manchester, Sheffield, and Lincolnshire Rail. Co.* (1887), L. R. 36 Ch. D. 626; *Fairbrother v. Bury Rural Sanitary Authority* (1889), 37 W. R. 544; *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588; *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*, [1898] 2 Ch. 614; [1899] 2 Ch. 217; *Canadian Pacific Rail. Co. v. Parke*, [1899] A. C. 635; *Batcheller v. Tunbridge Wells Gas Co.* (1901), 84 L. T. 765; *Mayor and Councillors of East Freemantle v. Anson*, [1902] A. C. 213; *Canadian Pacific Rail. Co. v. Roy*, ibid. 220; *English v. Metropolitan Water Board*, [1907] 1 K. B. 588; *Demerara Electric Co., Ltd. v. White*, [1907] A. C. 330.]

houses resting upon the arch of it. Being necessary to rebuild this arch, the defendants, to support the chimneys, placed under them a transum and two upright posts: the chimneys fell, and, in consequence of their fall, the houses fell also. Contradictory evidence was given as to whether proper care was taken in supplying the place of the arch. It further appeared that there was no specific notice given to the owner of the house to which the chimneys belonged of the danger in which they would be placed. But a general notice was given to the inhabitants of the houses that the sewer was repairing; the jury having found a verdict for the plaintiff, under the direction of the Chief Justice, a rule was obtained for a new trial, which was afterwards discharged, the Court holding "That the Commissioners of Sewers and agents, when repairing sewers in the neighbourhood of houses, were bound to take all proper precaution for their security; and that one question for the jury to consider was, whether shoring up was a proper precaution, and whether it had been omitted. I also told them," continued Abbott, C. J., "that, even if they were of opinion that the stack of chimneys could not, by any shoring up whatsoever, have been prevented from falling, still it was the duty of the defendants, if they thought so, to give specific notice of the danger to the owner; and that if they did not do so, they were responsible." "As to the merits of the case," said Bayley, J., "it is contended that the defendants are protected, if they acted bonâ fide, and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case" (b).

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exercise of a  
limited right.

*Jones v. Bird.*

In the case of *The King v. Commissioners of Sewers for the Levels of Pagham* (c), it was held that, where commissioners of sewers, acting bonâ fide for the benefit of the levels for which they were appointed, directed certain defences against the inroads of the sea, which caused it to flow with greater violence against and injure the adjoining land not within the levels, they could not be compelled to make compensation to the owner of it, or to erect new works for his protection. "I am of opinion," said Lord Tenterden, "that the only safe rule to lay down is this, that each landowner for him-

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Commissioners.*

(b) [*Drew v. New River Co.* (1834), 6 Car. & Payne, 754.]

(c) (1828), 8 B. & C. 355; [S. C., 2 Man. & Ry. 468; 32 R. R. 406.]



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Commissioners.*

self, or the commissioners acting for several landowners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy" (d).

"It seems to me," said Bayley, J., "that every landowner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose; and the commissioners may erect such defences as are necessary for the land intrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment for an abuse of the powers vested in them. But if they act *bonâ fide*, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title these two things must concur—damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Here the party may have sustained damage, but the commissioners have done no wrong. The right which each landowner has, is to protect himself, not to be protected by his neighbours. To that right no injury has been done, nor can any wrongful act be charged against the commissioners."

Civil law.

The civil law recognized the same distinction between acts of self-defence and ordinary acts in the use of property (e).

In this case it was in fact held, that the commissioners had, with respect to making defences against the sea, the same right as the owner of the land; and that as every owner has, as incident to the property, the right of doing whatever may be requisite for its protection from the incursions of the sea, they were not liable for the injury resulting from the erection of such defensive works.

(d) [See *Smith v. Kenrick* (1849), 7 C. B. 515; 78 R. R. 745.]

(e) *Idem* Labeo ait, si vicinus flumen (aut) torrentem averterit, ne aqua ad eum perveniat, et hoc modo sit effectum ut vicino noceatur, agi cum eo aquæ pluvie arcendæ, non posse, aquam enim arcere, hoc est, curare ne influat; quæ sententia verior est, si modo non hoc

animo fecit ut tibi noceat, sed ne sibi noceat.—Dig. 39, 3, 2, § 9, de aq. et aq. pl. arc.

Aggeres juxta flumina in privato facti, in arbitrium aquæ pluvie arcendæ veniunt, etiamsi trans flumen noceant; ita si memoria eorum extet, et si fieri non debuerunt.—*Ibid.* 39, 3, 23.

In the later case of *The Grocers' Co. v. Donne* (*f*), the same principles were recognized.

Tindal, C. J., in delivering the judgment of the Court of C. P., said: "But the question is, whether the facts found upon this award bring the case within the terms of the declaration. The cause having been referred, and the arbitrator having stated the facts for the opinion of the Court, we must see whether or not the facts so found raise the duty set up by the plaintiffs in their declaration. The declaration states that the commissioners wrongfully and injuriously did make, cut and dig a certain shaft, sewer, gutter and ditch, near unto an ancient messuage and premises in possession of the plaintiffs, and did unskilfully, wrongfully and improperly make, cut and dig the said shaft, sewer, gutter and ditch, so being near unto the said ancient messuage and premises of the plaintiffs as aforesaid, and did also make, cut, and dig the said shaft, gutter, sewer and ditch, without shoring up, propping or duly securing the said messuage and premises, or the earth and subsoil supporting the walls of the said ancient messuage and premises of the plaintiffs as aforesaid, in order to prevent the same from being injured by the said making, cutting and digging of the said shaft, sewer, gutter and ditch as aforesaid. As to the want of notice, the arbitrator has raised no question. We must then look at the award, and see whether or not the commissioners have conducted themselves in an unskilful, wrongful, and improper manner in the construction of the sewer in question. The allegation of unskilfulness is negatived by the award, for it expressly finds that the work was done in a skilful and proper manner. But the question is, whether the commissioners are to be mulcted in damages by reason of their having proceeded by a process called tunnelling, in preference to open cutting. If the award had found, that, in the judgment of experienced men, no injury would have resulted to the plaintiffs, had the commissioners proceeded by open cutting, the plaintiffs would have been entitled to a verdict. But the arbitrator finds that there was risk in either way, though less from open work than from the other mode; and if the commissioners were bound to pursue that mode which gave the greatest possible chance of escape from injury, the verdict ought to be entered for the plaintiffs. But how are we to say that the com-

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(*f*) (1836), 3 Bing. N. C. 34; 3 Scott, 591; [and *Stainton v. Woolrych* (1856), 356, and cases there cited; 43 R. R. 25 Beav. 225; 26 L. J. Ch. 300.]

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missioners are to be liable in damages, not because they did not perform the work in a skilful, proper and workmanlike manner, but because they did not adopt that course which afforded the utmost possible chance of averting danger? The Court is not to balance possibilities. We are called upon to pronounce a judgment against the commissioners, because, had another mode of operation been resorted to, by some remote possibility the damage of which the plaintiffs complain *might* not have accrued. It seems to me that the plaintiffs can only entitle themselves to a verdict by showing that the injury would not have happened if the sewer had been constructed by open cutting: and consequently the verdict must be entered for the defendant."

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causing a  
public  
nuisance.

Where, however, from the situation of the premises, the acts of the party, though done entirely on his own property, may be productive of injury to the public, he is bound to exercise such a degree of care and caution as shall prevent damage to persons exercising, on their part also, reasonable care to avoid the danger (*g*). If, however, he has used such due caution, he will not be liable for injury arising from the interference of a wrongdoer (*h*).

*Daniels v.  
Potter.*

Thus in *Daniels v. Potter and others* (*i*), an action was brought for negligently permitting the flap of the defendants' cellar to remain unfastened, whereby it fell upon and broke the plaintiff's legs. It appeared in evidence that the flap was placed in a slanting position, on a projecting ledge, about a foot above the pavement. It was not fastened in any way, but merely leaned against the window of the defendants' warehouse and the house adjoining. One of the plaintiff's witnesses said, that the passing of a stage coach or heavy waggon might have the effect of shaking it down. The defendants' witnesses stated that the flap was pulled over by some boys who were playing about, and who, though warned by defendants' men, would not go away; and that

(*g*) [It will be seen that in *Harcastle v. South Yorkshire Rail., &c. Co.*, post, p. 437, the question for the jury was held not to be whether the act was productive of danger to the public.

In the case of a dangerous public nuisance, as an obstruction to a way such as renders it impassable with safety, a person who incurs the danger, knowing of its existence, and suffers damage, is not prevented from recovering for the damage, if under the cir-

cumstances it was not inconsistent with common prudence to run the risk: *Clayards v. Dethick* (1848), 12 Q. B. 439; 76 R. R. 305; *Thompson v. North-Eastern Rail. Co.* (1860), 2 B. & S. 106. As to the doctrine of contributory negligence, see 1 Smith, L. C., 11th ed., p. 285.]

(*h*) [See *Reedie v. London and North-Western Rail. Co.* (1849), 4 Exch. 244; 80 R. R. 246.]

(*i*) (1830), 4 C. & P. 262; 34 R. R. 793. [And see ante, p. 427, n. (*s*).]

the flap had been placed in the same way for many years, and that no accident had happened.

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Tindal, C. J., said: "The defendants were bound, in placing the flap, to use such precaution as would preserve it under all ordinary circumstances from falling down; but if it was so secured, and a third person over whom they had no control came and removed it, then I think the defendants will not be liable. The plaintiff says, that the flap fell in consequence of the negligence of the defendants; the defendants' case is, that it was placed securely, and that a wrong-doer pulled it over on the plaintiff, and your verdict will be for the plaintiff or defendants, according as you believe the one or the other of these stories. There is no doubt as to the law of the case. The question for your consideration will be, whether upon this occasion the defendants and their servants did use due and ordinary care in placing up this flap so as to prevent any accident from happening. It might certainly have been secured by a string, or by a hook, or by some person holding it, if that were necessary to the security of it. A tradesman under such circumstances is not bound to adopt the strictest means, but he is bound to use such care as any reasonable man looking at it would say is sufficient; and if he does use such care in the placing of the flap, and a wrong-doer comes and displaces it from the position in which it has been placed, it being that in which a careful man would place it, he will not be answerable in an action, but the party must look for compensation to such wrong-doer who so displaced it."

The jury found for the plaintiff.

So, too, in *Proctor v. Harris* (j), where the action was brought against a publican for leaving open a trap-door on the foot-pavement, in the evening, after the lamps were lighted. It appeared that the defendant had, immediately before the accident occurred, been lowering a butt of beer into his cellar through this very aperture.

*Proctor v.  
Harris.*

Tindal, C. J., in summing up, said: "The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along

(j) (1830), 4 C. & P. 337; 34 R. R. 810.

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Harris.*

these footpaths with ordinary security. It may be said, on the one hand, that these kinds of things must be, and that trade cannot be carried on without them; but, on the other hand, it must be understood that as they are for the private advantage of the individual, he is bound to take proper care, when he is using his cellar, to prevent injury. With respect to the plaintiff, you will have to consider whether there was so little care and caution on his part, that he was himself guilty of negligence in running into the danger. If there had been sufficient light, most likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the nature of a nuisance, used in the manner it was, and whether, looking to all the circumstances, the plaintiff fell in, owing to the negligence and carelessness of the defendant, in not sufficiently protecting the place at this hour, being after dark. If you think so, you will find for the plaintiff. But if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant" (k).

*Barnes v.  
Ward.*

[A similar question arose in *Barnes v. Ward* (l). There, a woman in walking after dark along an immemorial public footway, met with her death by falling down an open unrailed area, of which the defendant was in possession. The area abutted on the way, and was made by the defendant for a house then in the course of erection by him. The action was brought under 9 & 10 Vict. c. 93, by the administrator of the deceased, for negligence, on the part of the defendant, in not having fenced or railed in the area. At the trial, the jury, having been directed that, if there was a public way abutting on the area and it would be dangerous to persons passing unless fenced, or a public way so near that it would produce danger to the public unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased,—gave a verdict for the plaintiff. The defendant moved, on points reserved, for a nonsuit, and also in arrest of judgment, and obtained a rule to show cause. On cause being shown, the Court, after taking time to consider their judgment, discharged the rule; and Maule, J., delivering the judgment, said as follows: "On the part of the

(k) [There was a similar direction to the jury in *Witherley v. Regent's Canal*

*Co.* (1862), 12 C. B. N. S. 2.]

(l) (1860), 9 C. B. 392; 82 R. R. 375.

[defendant, it was argued, that no use which a man chooses to make of his own property can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right: that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area, though not fenced, could be in any degree detrimental or dangerous.

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“In support of this view of the subject, reliance was placed on the case of *Blyth v. Topham* (m), where it was held that, if A., seised of a waste adjacent to a highway, digs a pit in the waste within thirty-six feet of the highway, and the mare of B. escapes into the waste and falls into the pit, and dies there; yet B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B.; but it was the default of B. himself that his mare escaped into the waste. And, in further support of this doctrine, a passage was cited from the judgment of Alderson, B., in *Jordin v. Crump* (n), where the case is put of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field, by the owner of it. ‘In such a case,’ says the learned judge (o), ‘the party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for the falling into it would be the act of the injured party himself.’ And as to the case of *Coupland v. Hardingham*, it was not only denied to be law by the counsel for the defendant, but it was further argued that, in that case,—as appeared by the original nisi prius record, procured by Coltman, J.,—as also in *Jarvis v. Dean*, the area was in one count alleged to be in the highway.

“But it seems clear to us that, in each of these cases, the area in question was not parcel of the road, but was an area meant to be fenced off from it, in the ordinary way, by upright iron rails, so as to exclude the public from it, in a manner quite inconsistent

(m) (1608), 1 Roll. Abr. 88; Cro. Jac. 158.

(n) (1841), 8 M. & W. 782.  
(o) 8 M. & W. 788.

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[with the notion of its being itself part of the highway. And with respect to the case of *Blyth v. Topham*, and the passage cited from the judgment in *Jordin v. Crump*, it must be observed, that, in these instances, the existence of the pit in the waste or field adjoining the road, is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

“In the present case, the jury expressly found the way to have existed immemorially; and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way, at the time the accident happened.

“The result is,—considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care,—it appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

“With regard to the objection, that the deceased was a trespasser on the defendant’s land at the time the injury was sustained,—it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does: but he does not forfeit his right of action for an injury sustained. Thus, in the case of *Bird v. Holbrook* (*p*), the plaintiff was a trespasser,—and, indeed, a voluntary one,—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred if the plaintiff had not trespassed on the defendant’s land. This decision was approved of in *Lynch v. Nurdin* (*q*), and also in the case of *Jordin v. Crump*, in which the Court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed that, if it were, the fact of the plaintiff’s being a trespasser would be no

(*p*) (1828), 4 Bing. 628; 1 M. & P. 607; 29 R. R. 657.

(*q*) (1841), 1 Q. B. 37; 4 P. & D. 672; 55 R. R. 191.

[answer to the action. For these reasons, we are of opinion that the declaration in this case discloses a good cause of action.]

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"The principle of the above decision," said Martin, B., delivering judgment in *Hardeastle v. South Yorkshire Rail., &c. Co. (r)*, "was that such an excavation was a public nuisance, and that an individual injury arising from such a nuisance was the subject-matter of an action to the party aggrieved.

*Hardeastle v. South Yorkshire Rail., &c. Co.*

"When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage-way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise—if in every case it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous.

"When a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself in the use of the land adjoining to any extent, further than that he should not make the use of the way dangerous to the persons who are upon it and using it; to do so would be derogating from his grant: but he gives no liberty or licence to the persons using the way to trespass upon his adjoining land(s), and if they in so doing come to misfortune, we think they must bear it, and the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable that they should be put up by those who use the way, or those who are under the

(r) (1859), 4 H. & N. 67.

(s) *Hounsell v. Smyth* (1860), 7 C. B. N. S. 731, shows that the mere fact of giving such licence would not make him responsible. Upon the question as to the extent of the dedication which is

presumed, see *Att.-Gen. v. Esher Lino-  
leum Co., Ltd.*, [1901] 2 Ch. 647; *Offin  
v. Rochford Rural District Council*, [1906]  
1 Ch. 342; and see *Chorley Corporation v.  
Nightingale*, [1906] 2 K. B. 612; *affd.*  
[1907] 2 K. B. 637.



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shire Rail.,  
&c. Co.*

[obligation to repair it, than by the person who dedicated it to the public, or his successors. As we are clearly of opinion that there is no such obligation to fence, as alleged in the declaration, and also that, upon the above state of facts, there is no liability, our judgment is in accordance with the principle of the case of *Blyth v. Topham*, which we think is a true one" (t).]

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(t) *Turry v. Ashton* (1876), L. R. 1 Q. B. D. 314; *Clark v. Chambers* (1878), L. R. 3 Q. B. D. 327.

## CHAPTER V.

## LEGALIZATION OF NUISANCES.

THE term nuisance is applied, in the English law, indiscriminately, both to disturbances of an easement already acquired, and infringements upon the natural rights of property, for which an action can be sustained. Strictly speaking, however, the term nuisance should be confined to the latter class of injuries only—those acts which, though originally tortious, as infringing the common law rights of property, may nevertheless, in process of time, confer a prescriptive title by enjoyment. This distinction may be further illustrated by considering, that when the matter of complaint is the disturbance of an easement, the acts done, if allowed to be continued for a certain period, would be evidence to show that no easement existed; whereas, in the case of a nuisance, properly so-called, the effect of a similar continuance will be evidence of a right.

Nuisance,  
what.

Many acts done upon a man's own property, which are in their nature injurious to the adjoining land, and consequently actionable as nuisances, may be legalized by prescription (a). Thus, the right not to receive impure air is an incident of property, and for any interference with this right an action may be maintained; but by an easement acquired by his neighbour, a man may, it appears, be compelled to receive the air from him in a corrupted state, as by the admixture of smoke or noisome smells, or to submit to noises caused by the carrying on of certain trades. Thus, too, with regard to flowing water, the right not to have impure water discharged on a man's land is one of the ordinary rights of property; the infringement of which can only be justified by an easement previously acquired by the party so discharging it.

Legalized  
by time.

Thus, it is said in Viner's Abridg. (b), that an ancient brew-house, though erected in Fleet Street or Cheapside, is not a nuisance. So, it seems that an ancient user may be a justification

(a) Cf. *Lyttelton Times Co., Ltd. v. Warners, Ltd.*, [1907] A. C. 476, where a nuisance from noise and vibration was legalized, on the ground of an implied

grant, arising from the common intention of the parties.

(b) Nuisance, G.

Nuisance  
legalized by  
time.

for the exercise of a noisy (*b*) or offensive trade (*c*), or for discharging water in an impure state upon the adjoining land (*d*) [or for polluting a stream (*e*)].

In *Bliss v. Hall*, Tindal, C. J., says, "The plaintiff came to his house clothed with all the rights appurtenant to it; one of which, at the common law, is a right to wholesome untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time that the law will presume a grant from his neighbours in favour of the party who causes it."

"Twenty years' user," said Park, J., "would legalize the nuisance."

From what  
period time  
runs.

[But until a nuisance arises, no one can complain. And therefore a right to carry on an offensive trade, or to pollute water with sewage, is not acquired merely by having carried on the trade or having drained into the water for twenty years; but it must be shown that the air over the plaintiff's land, or the water to which he is entitled, has been corrupted for that period (*f*), and corrupted to the extent of the right claimed (*g*), and so as to be actionable or preventible by the plaintiff or his predecessors (*h*).

No prescrip-  
tion for a  
common  
nuisance.

There can be no prescription to make a common nuisance, which is a prejudice to all people, because it cannot have a lawful beginning, by license or otherwise, being against the common law. Thus a prescription for the inhabitants of a town to lay logs in a highway was held void (*i*); and so of a prescription to send sewage into a public river (*k*), or to erect a weir in a navigable river not

(*b*) *Elliotson v. Feetham* (1835), 2 Bing. N. C. 134; S. C. 2 Scott, 174; 42 R. R. 557.

(*c*) *Bliss v. Hall* (1838), 6 Scott, 500; 4 Bing. N. C. 183; 44 R. R. 697.

(*d*) *Wright v. Williams* (1836), 1 M. & W. 77; 46 R. R. 265; *Brown v. Mayor and Corporation of Dunstable*, [1899] 2 Ch. 378.

(*e*) *Carlyon v. Lovering* (1857), 1 H. & N. 797; *Murgatroyd v. Robinson* (1857), 7 E. & B. 391; *Moore v. Webb* (1857), 1 C. B. N. S. 673; *Stockport Waterworks Co. v. Potter* (1861), 7 H. & N. 160; *Wood v. Sutcliffe* (1851), 2 Sim. N. S. 163; *Crossley v. Lightowler* (1867), L. R. 2 Ch. 478; *Baxendell v. McMurray* (1867), *ibid.* 790. Dist. Att.-Gen. v. *Luton Local Board of Health* (1856), 2 Jur. N. S. 180; *Earl of Harrington v. Corporation of Derby*, [1905] 1 Ch. 205.

(*f*) *Flight v. Thomas* (1839), 10 A. & E. 590; *Murgatroyd v. Robinson* (1857), 7

E. & B. 391; *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), L. R. 1 Ch. 349.

(*g*) *Crossley v. Lightowler* (1867), L. R. 2 Ch. 478; *Heather v. Pardon* (1878), 37 L. T. 393. Cf. *Lemmon v. Webb*, [1894] 3 Ch. 1; on appeal, [1895] A. C. 1, and *Rushmer v. Polsue and Alfieri, Ltd.*, [1906] 1 Ch. 234; *affd.*, [1907] A. C. 121.

(*h*) *Sturges v. Bridgman* (1879), L. R. 11 Ch. Div. 852. Cf. *Fletcher v. Bealey* (1885), L. R. 28 Ch. D. 688.

(*i*) *Fowler v. Sanders* (1618), Cro. Jac. 446; *Dewell v. Sanders* (1619), Cro. Jac. 490; 2 Rol. Abr. 265; Vin. Abr. Prescription, E.; Com. Dig. Prescription, F. 2.

(*k*) *Att.-Gen. v. Barnsley* (1874), 9 W. N. 37. The question as to whether there can be prescription to discharge sewage into the sea was raised, but not decided, in *Foster v. Warblington Urban*

[erected before the time of Edward I. (*l*); similarly, a claim to a right to use a public footway for wheeled traffic after forty years' user for that purpose was held bad on the ground that the user was in its inception, and had been all along, a public nuisance (*m*).

No prescription for a common nuisance.

But where the nuisance is public only in the sense of being injurious to many proprietors, as is an offensive trade, the same rule does not apply. The owners of property affected by such trade may have licensed it, or have taken from the tradesman subject to his right to carry it on (*n*).]

Some ancient authorities appear to have recognized a species of right to corrupt the air or disturb a natural easement given by an enjoyment, however short, provided that at the commencement of it no person was in a situation to be injured by such corruption or disturbance; the party afterwards complaining, even though the nuisance was modern, was said to have come to the nuisance, and was held to have no right of action for any injury sustained.

Doctrine of coming to nuisance exploded.

"If my neighbour," says Blackstone, "makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue" (*o*).

It is difficult to see on what principle this doctrine could have been supported; and indeed many of the old authorities are at variance with it, and the [more] recent decisions of the Court of Common Pleas upon this point appear to have restored the law to an accordance with the general principles of easements.

In *Leeds v. Shakerly* (*p*), the declaration stated that the plaintiff was seised in fee of a mill, and that he and all those, &c., from time whereof, &c., had had a watercourse running by three mills, A, B, and C, to his said mill. That the defendant cut the banks of the watercourse in A, whereby he lost the profits of his mill. After verdict for the plaintiff it was moved in arrest of judgment, "That it was not alleged that the plaintiff was seised of the mill at the

*Leeds v. Shakerly.*

*Council*, [1906] 1 K. B. 648; there is no such right at common law; *ibid.*; *Hobart v. Southend-on-Sea Corporation* (1906), 75 L. J. K. B. 305; 94 L. T. 337; 54 W. R. 454; 22 T. L. R. 307; compromised on appeal, 22 T. L. R. 530.

(*l*) *Rolle v. Whyte* (1868), L. R. 3 Q. B. 286; *Lecomfield v. Lonsdale* (1870), L. R. 5 C. P. 657. Cf. *Trail v.*

*McAllister* (1891), 25 L. R. Ir. 524.

(*m*) *Sheringham Urban District Council v. Holsey* (1904), 91 L. T. 225.

(*n*) *Reg. v. Neville* (1792), Peake, 125 (91). Cf. *Harrop v. Hirst* (1868), L. R. 4 Exch. 43.

(*o*) 2 Com. 402.

(*p*) (1600), Cro. Eliz. 751.

Doctrine of  
coming to  
nuisance.

*Leeds v.  
Shakerly.*

time of the cutting." For the plaintiff it was argued that the words, "seisitus existit, ipse qui et omnes illi," &c., have used the watercourse, were a sufficient averment of seisin at the time; and that this very objection had been made and overruled in *Dame Broune's Case* (q). But all the Court (absente Popham) held, that the declaration was insufficient for this cause. Gawdy said that, in *Broune's Case*, the opinion of Lord Dyer was that the count was insufficient, and error is there brought of the said judgment.

*Moore v.  
Dame Broune.*

In Dyer's report of the case of *Moore v. Dame Broune*, above referred to, it is said, "But the writ and count were faulty in that the plaintiff was not supposed to be owner of the said site and messuage of Blackfriars at the time of the diversion, but only at the time of the action commenced; whereas the plaintiff *is* seised, and does not say *was* seised, &c., therefore the plaintiff was not damnified by the diversion; wherefore the plaintiff could not have judgment given." But by Benloe's Reports (216), it appears that judgment at length was given. And the roll being searched, it appears judgment was given, and the plaintiff acknowledged satisfaction of the damages, and the defendant afterwards brought a writ of error.

*Tenant v.  
Goldwin.*

In *Tenant v. Goldwin* (r), where it was held, that the plaintiff was entitled to recover damages against the defendant, who had allowed his wall to be out of repair, so that the filth from his forica ran into the plaintiff's cellar, there is the following dictum of Lord Holt: "If a man erects a house and a house of office, and the house of office adjoins to a vacant piece of ground which keeps in the filth of the house of office, if the owner of the vacant piece of ground will dig a cellar there, he must make a wall to the house of office."

In the report in Salkeld, who was counsel in the case, the above dictum is given with the very important additional term "that the house of office was ancient," and even then it is enunciated as a doubtful position. "The case might possibly be such that the defendant might not be bound to repair, as if the plaintiff made a new cellar under the plaintiff's old privy; or in a vacant piece of ground which lay next the old privy; in such case the plaintiff must defend himself."

(q) (1572), Dyer, 319, b.

(r) (1705), 2 Lord Raymond, 1089;

S. C., 1 Salk. 360. [See *Alston v. Grant* (1854), 3 El. & Bl. 128.]

In *Laurence v. Obee* (s), where an action was brought for a nuisance, and it appeared that the nuisance was not felt by the plaintiff until he made a window through which the offensive smell entered, Lord Ellenborough is reported to have said, "That the plaintiff, having brought the nuisance upon herself by opening the window, had no right of action." It is fully consistent with the facts stated in the report, that the nuisance might have been an ancient one, and therefore legalized by time. It was not pressed upon the Court that the right to open a window and the right not to have corrupted air immitted upon a man's property are both common law rights requiring no easement to support them. The wall in which the window was opened was an ancient one, but no point appears to have been raised on that ground.

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coming to  
nuisance.

*Laurence v.  
Obee.*

These dicta, however, appear to be opposed to principle, and to the general current of authority, both ancient and modern.

*Ric. de D. (t)* brings a writ of "Quod permittat" against R. and S., and the nuisance was assigned, that, whereas he hath a house in S., with apple, pear, and other trees, bearing fruit, the defendant levied a lime-kiln so near to the house of the said Ric., that, when the kiln was burning, the smoke thereof burnt and scorched the trees, which became dry and unfruitful. Lib. Ass.

The defendant pleads, that the plaintiff hath no estate in the tenement to which, &c., except as lessee for life under the Abbot de Berg.

The defendant further pleaded, that the lime-kiln was so built and used by the defendant's father before the plaintiff had any interest in the frank tenement; without this, that he had levied any nuisance since, &c.

Upon argument, the Court held the plea bad—"If the defendant's father were now alive, the plaintiff would have an assize against him."

Herle, J., said: "It might be he (the father) had the kiln there, but did not use it, and the tort began with the user; or that the tort was begun, and then discontinued, and renewed again, after he was possessed of the frank tenement; and then he shall have his assize. Thus, if my father had a right of way, which was stopped by a hedge or by a ditch levied across it, and the tort was submitted to without debate all the lifetime of my father, and after his death I find the way open, and enter and use it, and am

(s) (1814), 3 Camp. 514; 14 R. R. 830.

(t) Assiz. anno. 4, pl. 3, p. 6.

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nuisance.

Lib. Ass.

afterwards disturbed by the feoffee of him who levied the hedge, I shall have an assize of nuisance.

"So here, although we have the kiln before, &c., and the tort begun, if afterwards such tort be discontinued, and then in his (plaintiff's) time it begin (again) to burn, he shall have an action for such tort."

Fitz. N. B.

In Fitzherbert (*u*) it is said, "If a man levy a nuisance unto the freehold of another, and he to whom the nuisance is done make a feoffment in fee of the land, and he who did the nuisance make a feoffment of the land in which the nuisance is, yet there is a writ in the Register for the feoffee of him to whom the nuisance was levied against the feoffee of the other to reform that nuisance."

*Westbourne v.*  
*Mordant.*

In *Westbourne v. Mordant* (*x*), which was an action upon the case, the declaration stated that the plaintiff was possessed of a meadow adjoining a certain brook, from the 20th April, et adhuc inde, &c., and that defendant, on the said 20th April, put in divers loads of stones into the said brook, and by it obstupavit aquam illam; that it, from the said 20th April to the day of the writ purchased, overflowed his meadow, so that he could not have any benefit from it.

After verdict, it was moved in arrest of judgment, "because the nuisance is supposed to be done before the plaintiff's title did commence, so no cause of action."

Gawdy, J., said: "The declaration is good, for an action of the case declareth the whole matter, so that it is not material when the nuisance was erected, for he that is hurt by it shall have an action."

Fenner, J., agreed, it may be the nuisance was not by the stopping till the running of the water, and the action being brought, as the truth is, is well brought; and Wray being absent, they commanded judgment to be entered, if nothing said to the contrary.

*Beswick v.*  
*Cunden Hill.*

In *Beswick v. Cunden Hill* (*y*), the plaintiff declared that the defendant "levied a dam in such a river such a day, whereby it surrounded the land of J. S., who afterwards enfeoffed the plaintiff thereof, and that defendant adhuc malitiosè custodivit the said dam,

(*u*) N. B. 124 H. p. 290.

(*x*) (1590), Cro. Eliz. 191.

(*y*) (1593), Cro. Eliz. 402.

whereby the plaintiff's land is surrounded." To this declaration the defendant demurred in law.

Doctrine of coming to nuisance.

*Beauwick v. Cunden Hill.*

In support of the demurrer it was contended, that the plaintiff could not maintain the action, as he had nothing in the land at the time when the nuisance was erected, and 4 Assize, 3, was cited, and no new injury was done; it was admitted that an action would lie if any new act had been done, as the turning of the watercock in Dyer, 319, which made a new nuisance each time.

On the other side it was said, that the action was not brought for levying the dam, but continuing the same from such a day to such a day, which was after the plaintiff's purchase, &c. *Rolf's Case*, decided in Easter Term, 25 Eliz. (2), was cited, that "where one erected a house so near to another's that the rain descended from the new house, &c., and the heir brought an action upon the case for the nuisance made by building the house in his father's time, he should recover by judgment."

Gawdy and Popham, Justices, thought the action was well brought for the continuance; and Popham took the distinction between the cases in which no interest remains in the thing obstructed to the party against whom the nuisance is done, and where he still retains some profit or interest therein. In the former case the remedy is provisional only; in the latter it passes to the heir or purchaser. "If I have potwater running from my river to my home, and T. stops it in his land before it comes to my land, and T. die, or make a feoffment over, my heir or feoffee have not any remedy for this tort made before their time; but where any profit remains which comes to the heir or feoffee, after the nuisance done, therefore, for so much of the profit as is come unto them, and is taken from them by the continuance of the nuisance, they shall have their action. Then here, by the levying of the dam, the inheritance of him to whom it was levied is not taken away: but although his land be surrounded, some profit remained unto him, which he hath conveyed to the feoffee, which being taken from him by the continuance of the nuisance, it is reason that the feoffee should have his action; and, therefore, if one levies a bank in a river, whereby part of my land is surrounded, and afterwards I make a feoffment of my land to J. S., and afterwards another part is surrounded by reason of that bank, he shall have an assize of nuisance (quod fuit concessum); so here,

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(2) Cited p. 5 Rep. 101 a.



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*Beswick v.  
Cunden Hill.*

for that the land of the feoffee grew a malo ad pejus die in diem, by reason of the inundation made by this dam, it is reason the feoffee should have his action. The same law is for a non-feasance, viz., for not repairing of a bank where, &c."

Clench and Fenner, Justices, contra, were of opinion, that the feoffment extinguished the tort, "and nothing had been done since the feoffment which the feoffee could punish." Upon its being moved again, the justices all agreed that the action was well brought, and it was accordingly adjudged for the plaintiff.

Another action on the case, between the same parties, for the continuance of a certain bank (quandam molem), appears to have been decided in favour of the defendant on demurrer to the declaration:—"All the justices resolved for the defendant. 1st. That this action upon the case lies not, because, if it were a nuisance, the plaintiff might have his remedy by an assize or quod permittat (a); and a man shall never have an action on the case where he may have any other remedy, by any writ found in the Register, for this is only given where there wants such a remedy. 2nd. There is not here any offence committed by the defendant, for he allegeth that he kept and maintained a bank, which is, that he kept it as he found it, and that is not any offence done by him, for he did not do anything; and if it were a nuisance before his time, it is not any offence in him to keep it; but the plaintiff is to have his remedy to abate it by a quod permittat; and therefore, this case differs from 4 Ass. pl. 3, for there the using was a new nuisance, but is not so here" (b).

In the report of the same case in Moore (c), it is stated, "that the bank was levied before the defendant was enfeoffed"; and it was adjudged "by the court, that the action lay for the continuance against the feoffee, and that in such case it would lie against an heir; and a case was cited of *Rolf v. Rolf* in this court, where a house was built so near to another house, that the (new) one annoyed the other with continual dropping, and the feoffment was made of the new house; and it was adjudged that an action on the case would lie against the feoffee for the continuance."

(a) [On the nature of these writs, see 3 Blackst. Comm. 220, 1.]

(b) Cro. Eliz. 520, nom. *Beswicks v. Cunden*.

There appears to be some mistake in the report here, as the defendant not only kept, but also levied the dam,

though not in the plaintiff's time. The Court appear to have confounded the right of a plaintiff to sue with the liability of a defendant to be sued for the continuance of a nuisance erected before his estate commenced.

(c) F. 353, nom. *Beswick v. Cunden*.

According to this latter report, these cases are only an authority for the proposition that the feoffee of a party who erected a nuisance is liable for its continuance—a position which, except in some particular cases, appears hardly to have been questioned (*d*).

Doctrine of  
coming to  
nuisance.

The report of the case of *Rolf v. Rolf*, as given by Lord Coke (*e*), is altogether different, and fully confirms the passage from Fitz. N. B., above cited. John Rolf was seised of a house in fee, and Richard Rolf was seised of a piece of land adjacent to the said house, and on this he built a new house, so nearly adjoining the house of John that the rain fell thereon from the roof of his new house. John Rolf died, and his house descended to his son, as did the new house and land to the son of Richard, who refused, upon request made to him, to remove the projecting eaves, and John, the son, accordingly brought an action against him, and upon demurrer it was held, that the action lay—because the defendant, on request, did not reform the nuisance which his father made, but suffered it to continue to the prejudice and damage of the son and heir of him to whom the wrong was done.

*Rolf v. Rolf.*

In Moore, 449, nom. *Beswick v. Comeden*, three exceptions are taken: 1st, That assize lay and not case. 2nd, That “custodire and manutene” are not sufficient words of tort. And 3rd, That a quod permittat lay by the statute, and not an action on the case. And it was adjudged, that the plaintiff should take nothing by his writ.

In another report, nom. *Beswick v. Omuden* (*f*), it is said, “adjudged that the feoffee shall have an action on the case for a nuisance erected before his time and continued during his time, but only for the continuance.”

In *Penruddock's Case* (*g*), one Clark brought a quod permittat against Penruddock and wife, “and the case was such—John Cock built a house on his own freehold so near the curtilage of Thomas Chuckley that it hung over three feet of the said curtilage; and afterwards Chuckley, to whom the nuisance was done, conveyed his house to the plaintiff, and John Cock conveyed his house to the defendants; and the first question was, whether the writ lies in this case for a feoffee or not”; and it was objected, “that when a wrong and injury is done by levying of a nuisance

*Penruddock's  
Case.*

(*d*) [See acc. *Broder v. Saillard* (1876),  
L. R. 2 Ch. D. 692.]

(*e*) (1738), 5 Rep. 101.

(*f*) Moore, 599.

(*g*) (1738), 5 Rep. 100 b.

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*Penruddock's  
Case.*

for which an action lies, that if he who has the freehold to which the nuisance is done conveys it over, now this wrong is remediless. As if the landlord encroaches on the rent of his tenant, the tenant cannot avoid this wrong in an avowry; but in an assize, or a cessavit, or a ne injustè vexes, he may. But if the tenant to whom the wrong is done enfeoffs another, his feoffee shall never avoid this wrong, for he shall take the land in the same plight as it was given him." And so in the case of common.

"But it was answered and resolved, that the dropping of the water in the time of the feoffee was a new wrong, so that the permission of the wrong by the feoffor, or his feoffee, to continue to the prejudice of another, should be punished by the feoffee of the house, &c., and if it be not reformed after request, a quòd permittat lies against the feoffee." This judgment was affirmed on a writ of error, and "so this case was adjudged by all the judges of England."

*Some v.  
Barvish.*

In *Some v. Barvish* (h), it is said, "It was also held that for a nuisance erected in the time of the devisor, and continued afterwards, (as this case was,) the devisee shall join in the action; for the continuance thereof is as the new erecting of such a nuisance."

*Roswell v.  
Prior.*

In *Roswell v. Prior*, as reported in 12 Mod. 635, after giving the decision that an action lay for continuing a nuisance either against the lessor, or his lessee, at the plaintiff's option (i), there is the following dictum:—"But if this action here were brought by an alienee of the land to which the nuisance was against the erector, and the erection had been before any estate in the alienee, the question would have been greater; because the erector never did any wrong to the alienee." The reports of this case in Salkeld and Lord Raymond (k) contain no such dictum, which, at the utmost, amounts to a doubt only, and is directly at variance with the decisions in *Rolf v. Rolf* and in *Penruddock's Case*.

*Viner.*

In *Viner's Abr.* (l), it is said, "If a man build a kiln to burn chalk to the nuisance of my house and trees next adjoining, and after discontinues the use of it, and then dies, and his heir renews the use of it again, this is a new nuisance by the heir, and a quòd permittat lies against him for it. But otherwise it would be, if

(h) (1610), Cro. Jac. 231.

(i) [Of. *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 578.]

(k) *Roswell v. Prior* (1699), 2 Salk. 460; 1 Lord Raym. 392, 713.

(l) Nuisance, L.

the kiln never was discontinued in the life of the father, but had been always used, and the heir continued to use in the manner; for there no quòd permittat lies against him.”—4 Ass. 3.

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The case itself (*m*), of which this purports to be an abstract, does not contain the last of these two positions; in addition to which it is expressly relied on in *Penruddock's Case* as an authority for a quòd permittat lying in a case where, if the above quotation were correct, it clearly could not have been maintained. The position in *Viner* would no doubt be true, if sufficient time had elapsed to confer a prescriptive title on the father, and no addition had been made by the son; but of this no mention is made in the Year Book.

“Where there hath been an ancient brewhouse time out of mind, although in Cheapside or Fleet Street, &c., this is not any nuisance, because it shall be supposed to have been erected when there were no buildings near. Contrà—if a brewhouse should be now erected in any of the streets or trading places, this shall be a nuisance, and an action on the case lies for whomsoever shall receive any damage thereby; and accordingly in an action brought by one Robins, a laceman, in Bedford Street, against a brewer, for a nuisance from the brewhouse to the goods in his shop, (it being a brewhouse of *ten years' standing*,) the jury gave, for two years' damages, 60*l*.” The obvious inference from which is, that the laceman's shop had only been open during the two years for which the damages were given (*n*).

*Brewery Case.*

In the [more] recent case of *Elliotson v. Feetham and another* (*o*), the declaration complained of a nuisance to the plaintiff's dwelling-house from certain workshops and a manufactory for the working of iron belonging to the defendants. The defendants pleaded, “That they were possessed of their said workshops and manufactory in the declaration mentioned long, to wit, for the space of ten years, before the plaintiff became possessed of his said term of and in the said messuage or dwelling-house, with the appurtenances, in the declaration mentioned; and that the defendants always from the time at which they so became possessed of their said workshops and manufactory, down to and until the plaintiff so became possessed of his messuage or dwelling-house with the appurtenances, as aforesaid, used, exercised, and carried on the said trade and

*Elliotson v.  
Feetham.*

(*m*) Vide ante, 443.

(*n*) *Viner*, Abr. Nuisance, G. pl. 18.

(*o*) (1835), 2 Bing. N. C. 134; S. C., 2 Scott, 174; 42 R. R. 557.

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*Elliotson v.  
Feetham.*

business of ironmongers, and worked iron, and made and manufactured ironmongery goods in their said workshops and manufactory, without any let, suit, interruption, molestation, or complaint by or on the part of the owners or occupiers of the said messuage or dwelling-house now of the plaintiff: and that the defendants, from the time the plaintiff so became possessed of his said messuage or dwelling-house hitherto, had continued to use, exercise and carry on the said trade and business of ironmongers, and to work iron, and make and manufacture ironmongery goods in their said workshops and manufactory in the same manner as they had always, from the time of their becoming possessed of their said workshops and manufactory, down to and until the time when the plaintiff so became possessed of his said messuage or dwelling-house, been used and accustomed to do, and without making or causing to be made in their said workshops and manufactory larger fires, or louder, heavier, more jarring, varying, or agitating, hammering, or battering sounds or noises than the defendants had during all the previous time been accustomed to do, or than were necessary and requisite to enable them to carry on their said trade and business in and upon their said workshops and premises, in the same manner as they had always theretofore been used and accustomed to do."

Upon demurrer to the replication, the plea, which it was attempted to support on the authority of the case of *Leeds v. Shakerly* (*p*), was held bad, "the Court intimating that the defendants should at least have alleged a holding of twenty years' duration" (*q*). Judgment was given for the plaintiff.

*Bliss v. Hall.*

In *Bliss v. Hall* (*r*), an action on the case was brought for a nuisance occasioned by the defendant carrying on the business of a candle-maker. The defendant pleaded that he was possessed of the messuage in which, &c., for three years before the plaintiff became possessed of the house to which, &c., and had during all that time carried on his business "in the same manner and degree, and to the same extent, and at the same hours, as at the time when" the nuisance complained of took place. Upon demurrer to this plea the Court gave judgment for the plaintiff.

(*p*) (1600), Cro. El. 751.

(*q*) [Even this would apparently have been insufficient, unless the plaintiff or his predecessors had occupied his dwelling-house during the whole period:

*Sturges v. Bridgman* (1879), L. R. 11 Ch. Div. 852.]

(*r*) (1838), 5 Scott, 500; 4 Bing. N. C. 183; 44 R. R. 697.

Tindal, C. J., said, "The plaintiff in his declaration complains that the defendant wrongfully carried on in messuages contiguous to the messuage of the plaintiff the trade or business of a candle-maker, &c., by means whereof divers noisome, noxious, and offensive vapours, fumes, smells, and stench, issued from the defendant's messuages, and diffused themselves through and about the plaintiff's messuage, thereby corrupting the air, and making the plaintiff's dwelling offensive and unwholesome, &c.

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*Bliss v. Hall.*

"The defendant, in answer, says, that he was possessed of his messuages for the space of three years next before the plaintiff became possessed of his messuage, and that he had, during all that time, carried on the trade of a candle-maker there to the same extent and in the same manner as at the time complained of. That plea appears to me to afford no answer whatever in point of law to the charge in the declaration, which unquestionably is a nuisance. It may be that the defendant was the first occupier; but the plaintiff came to his house clothed with all the rights appurtenant to it, one of which at common law is a right to wholesome and untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time, that the law will presume a grant from his neighbours in favour of the party who causes it. *Elliotson v. Feetham* decided the point."

Park, J., cited *Penruddock's Case* (s), and observed, "*Elliotson v. Feetham* is identical with the present case. As the Lord Chief Justice there observed, 'when a man takes a house he takes it with all the rights incident to it;' so here, even in the case supposed by the defendant's counsel, the plaintiff would have had a right to that of the deprivation of which he complains. Twenty years' user would legalize the nuisance, but here the defendant only alleges a user of three years."

Vaughan, J., concurred. "An offensive trade," said the learned judge, "may be a nuisance or not, according to the place in which it is carried on. Here the manufactory complained of is not shown to have been remote from human habitations. There is nothing upon the face of the plea to show that the nuisance is hallowed by prescription." And Mr. Justice Bosanquet added, "It clearly is not enough in such a case as this for the defendant to show a short possession and exercise of the offensive trade anterior to

(s) (1738), 5 Rep. 100 b; supra, p. 447.

Doctrine of coming to nuisance.

Doctrine now exploded.

the commencement of the plaintiff's possession. Nothing less than a twenty years' user will afford a defence."

[In *Tipping v. St. Helens Smelting Co.* (t) it was held that the plaintiff was not disentitled to relief by injunction by reason of his having come to the nuisance, and it is now perfectly settled that the doctrine is exploded (u).]

What amounts to a nuisance.

It is by no means easy to define in general terms what precise amount of infringement of the general rights of property is requisite to confer a right of action. There "must, at all events, be some sensible diminution of these rights affecting the value or convenience of the property;" and though certain trades have been declared to be nuisances when carried on in particular situations, yet it appears to be in every instance a question of fact whether such a degree of annoyance exists as can be said to amount to a nuisance.

["*Lex non favet delicatorem votis.*" The question in each case is, according to Knight Bruce, V.-C., in the case of *Walter v. Selfe* (x), (affirmed on appeal), "whether the inconvenience ought to be considered as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to the plain, sober, and simple notions among English people;" in other words, "will the proceeding abridge and diminish seriously and materially the ordinary comfort of existence to the occupiers, whatever their rank or station, or whatever their state of health may be?" (y).]

Public nuisance actionable.

The fact that a private nuisance may also be indictable as a nuisance to the public, does not prevent any individual from bringing an action against the party causing it, provided he can prove that he has himself sustained some special injury thereby (z).

(t) Post, p. 459.

(u) *Att.-Gen. v. Corporation of Manchester*, [1893] 2 Ch. at p. 95.

(x) (1851), 4 De G. & S. 315; 87 R. R. 393.

(y) Cf. *Crump v. Lambert* (1867), L. R. 3 Eq. 409; *Ball v. Ray* (1873), L. R. 8 Ch. 467; *Rushmer v. Polsue and Alfieri, Ltd.*, [1906] 1 Ch. 234; aff. [1907] A. C. 121.

(z) *Chichester v. Lethbridge* (1738), Willes, 73; *Crowder v. Tinkler* (1816), 19 Ves. 621; 13 R. R. 267; [*Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109; reversed by C. A., [1903] 2 Ch. 556; but restored by H. of L., [1906] A. C. 1; *Sherringham Urban Council v.*

*Holsey* (1904), 91 L. T. 225; *Wednesbury v. The Lodge Holes Colliery Co., Ltd.*, [1907] 1 K. B. 78, per Cozens-Hardy and Farwell, L.J.J. Cf. *Stoke Parish Council v. Price*, [1899] 2 Ch. 277; *Chaplin & Co. v. Mayor of Westminster*, [1901] 2 Ch. 329; *Att.-Gen. and Spalding Rural Council v. Garner*, [1907] 2 K. B. 480. That private injury, arising from a public nuisance, is the subject-matter of an action for damages, is a doctrine as old as any in the common law: per Cur. in *Hardcastle v. South Yorkshire Rail, &c. Co.*, ante, p. 437; and see the judgment of Kindersley, V.-C., in *Soltan v. De Held* (1851), 2 Simons, N. S. 133; 89 R. R.

It would be an endless task to enumerate all the instances of nuisance for which an action can be maintained. It may be sufficient to observe, that the erection of anything offensive, so near the house of another as to render it useless and unfit for habitation, e.g., the erection of a swine-sty, lime-kiln, privy, smith's forge, tobacco-mill, tallow-furnace, near a common inn, or the like, is actionable (a). Instances of nuisance.

The oldest reported case of a nuisance caused by carrying on an offensive trade is in 4 Ass. 3, already mentioned, for erecting a lime-kiln.

"A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down, if it be erected to the nuisance of another: in like manner of a glass-house, and they ought to be erected in places convenient for them" (b). "The erecting a common or private brew-house is not of itself a nuisance, nor the burning of sea-coal in it; but if it is erected so near the house of another that his goods are thereby spoilt, and his house made uninhabitable by the smoke, an action lies" (c). Tan-house.  
Glass-house.  
Brewery.

In 1 Roll. Abr. (d) are given instances of nuisances, by a man keeping stinking tallow and greaves, the stench whereof drove away the guests from the plaintiff's house; and erecting a smelting-house adjoining plaintiff's field, whereby the grass was withered and his horses and cows killed (e). Smelting-house.

In 2 Roll. Abr. (f) the instances given of trades which are nuisances at law, are:—A glover making a lime-pit so as to corrupt a watercourse; a man levying a pig-sty so near a house that by reason of the smell the owner cannot live therein (g); the erecting a lime-kiln; and "a dyer erecting a dye-house so near to my house that I cannot dwell therein, pur le feter del fume et auter sordides." Lime-pit.  
Pig-sty.  
Dye-house.

In *Aldred's Case* (h), the declaration stated that, by reason of the stench from the defendant's pig-sties, "the plaintiff and his servants could not remain in his house for fear of infection."

245, in which case the nuisance complained of was loud noise of bells; and *Fritz v. Hobson* (1880), L. R. 14 Ch. D. 542.]

(a) Sel. N. P. 12th edit. 1129; *Elliotson v. Feetham* (1835), 2 Bing. N. C. 134; 42 R. R. 557; *Bliss v. Hall* (1838), 5 Scott, 500; 4 Bing. N. C. 183; 44 R. R. 697.

(b) Per Hide, C. J., in *Jones v. Powell* (1629), *Palmer*, 539.

(c) Agreed per Cur. Ibid.

(d) P. 88, Action on the case, pl. 6, 7.

(e) [*Bishop Auckland Local Board v. Bishop Auckland Iron Co.* (1882), L. R. 10 Q. B. D. 138.]

(f) *Nusans*, 141, pl. 13, 14, 15, 18.

(g) [*Banbury Sanitary Authority v. Page* (1881), L. R. 8 Q. B. D. 97; *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588.]

(h) (1611), 9 Rep. 57 b.



Instances of nuisance.	<p>In <i>Rex v. Pierce</i> (i), an information was brought against the defendant, by the Recorder of London, for erecting and continuing a soap-boilery in Wood Street. It was held by Jefferies, C. J., "That, though such a trade is honest, and may be lawfully used, yet, if by its stench it be an annoyance to the neighbours, it is a nuisance." A case is also mentioned of a "calender-man in London, in Bread Street, who was convicted before Lord Hale on such an information; for that the noise of his trade disturbed the neighbours and shook the adjacent houses": and another case of a brew-house on Ludgate Hill, <i>Rex v. Jordan</i>, where defendant was compelled "to prostrate the same and convert it to other purposes; for that such trades ought not to be in the principal parts of the city, but in the outskirts."</p>
Soap-boilery.	
Noise.	
Dyer.	<p>A case is cited in <i>Jones v. Powell</i> (k), of an action brought against a dyer, "Quia fumos, foeditates, at alia sordida juxta parietes querentis posuit, per quod parietes putridæ devenerunt, et ob metum infectionis per horridum vaporem, &amp;c., ibid. morari non audebat." In <i>Jones v. Powell</i>, a brew-house in which sea-coal was burnt was held to be a nuisance.</p>
Small-pox hospital.	<p>In <i>Baines v. Baker</i> (l), Lord Hardwicke refused to grant an injunction to stay the building of a small-pox hospital in Cold Bath Fields, very near the houses of several of the plaintiff's tenants; though it appeared that in the lease of the house in question, granted by the plaintiff to the defendant, there was a covenant against turning it into a brew-house, because it would be a nuisance. The Lord Chancellor said: "I am of opinion it is a charity likely to prove of great advantage to mankind. Such an hospital must not be far from a town, because those that are attacked with that disorder, in a natural way, may not be carried far."</p>
Other cases.	<p>[In the last-cited case there was, in fact, no nuisance at all; see the comments of Kindersley, V.-C., in <i>Soltau v. De Held</i> (m). The later cases of nuisance have been chiefly concerned with</p>

(i) 35 Car. 2; 2 Shower, 327, Case 329.

(k) (1629), Hutton, 136.

(l) (1752), Ambler, 158; 3 Atk. 750.

(m) (1851), 2 Sim. N. S. 133; 89 R. R. 245. See also *Metropolitan Asylum District v. Hill* (1881), L. R. 6 App. Cas. 193; *Fleet v. Metropolitan Asylums*

*Board* (1886), 2 Times L. R. 361; *Ben-delow v. Guardians of Wortley Union* (1887), 4 Times L. R. 67; *Att.-Gen. v. Corporation of Manchester*, [1893] 2 Ch. 87; *Att.-Gen. v. Rathmines and Pembroke Joint Hospital Board*, [1904] 1 Ir. R. 161; *Mews' Digest*, col. 268; and *Att.-Gen. v. Corporation of Nottingham*, [1904] 1 Ch. 673.

[noise or vibration (*n*) or obstruction of highways by crowds (*o*), or with the disposal of sewage and refuse (*p*).]

The right of sending on the neighbouring land air impregnated with smoke, to such an extent as to be a nuisance, was recognized as a servitude by the civil law in the same manner as the right of throwing water used in manufactories, or otherwise, upon the adjacent land (*q*), though no such servitude existed where the right was claimed to such an extent only as was necessary for the ordinary purposes of domestic life (*r*).

The following authority has been frequently cited:—In Com. Dig. (*s*) it is said: “So it (an action) does not lie for a reasonable use of any right, though it be to the annoyance of another. As if a butcher, brewer, &c. use his trade in a convenient place,

Instances of  
nuisance.

Civil law.

Doctrine of  
convenience.

(*n*) *Soltau v. De Held* (1851), 2 Sim. N. S. 133; 89 R. R. 245; *Gaunt v. Fynney* (1872), L. R. 8 Ch. 8; *Ball v. Ray* (1873), *ibid.* 467; *Broder v. Saillard* (1876), L. R. 2 Ch. D. 692; *Heather v. Pardon* (1878), 37 Law Tl. Rep. 393; *Sturges v. Bridgman* (1879), L. R. 11 Ch. Div. 852; *London, Brighton, and South Coast Railway v. Truman* (1885), L. R. 11 App. Cas. 45; *Harrison v. Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; *Bellamy v. Wells* (1891), 60 L. J. Ch. 156; 63 L. T. 635; 39 W. R. 158; *Christie v. Davy*, [1893] 1 Ch. 316; *Germaine v. London Exhibitions, Ltd.* (1896), 75 L. T. 101; *Knight v. Isle of Wight Electric Light and Power Co.* (1904), 90 L. T. 410; *Colwell v. St. Pancras Borough Council*, [1904] 1 Ch. 707; *Lipman v. Pullman* (1904), 91 L. T. 132; *Rushmer v. Polsue and Alferi, Ltd.*, [1906] 1 Ch. 234; *aff.* [1907] A. C. 121.

(*o*) *Bellamy v. Wells*, *ubi sup.*; *Barber v. Penley*, [1893] 2 Ch. 447; *Chase v. London County Council* (1898), 62 J. P. 184; *Dewar v. City and Suburban Race-course Co.*, [1899] 1 Ir. R. 345.

(*p*) *Att.-Gen. v. Basingstoke* (1876), 24 W. R. 817; *St. Helen's Chemical Co. v. St. Helen's* (1876), L. R. 1 Exch. D. 196; *Humphries v. Cousins* (1877), L. R. 2 C. P. D. 239; *Glossop v. Heston and Isleworth Local Board* (1879), L. R. 12 Ch. Div. 102; *Att.-Gen. v. Dorking* (1882), L. R. 20 Ch. Div. 595; *Charles v. Finchley Local Board* (1883), L. R. 23 Ch. D. 767; *Ballard v. Tomkinson* (1885), L. R. 29 Ch. Div. 115; *Brown v. Mayor and Corporation of Dunstable*, [1899] 2 Ch. 378; *Gibbings v. Hungerford*, [1904] 1 Ir. R. 211.

There have been other recent decisions upon miscellaneous nuisances, e.g., heat, *Reinhardt v. Mentasti* (1889), L. R. 42 C. D. 685; *Sanders-Clark v. Grosvenor Mansions Co., Ltd.*, [1900] 2 Ch. 373; fat-melting business, *Att.-Gen. v. Cole & Son*, [1901] 1 Ch. 205; pollution of water by gas, *Batcheller v. Tunbridge Wells Gas Co.*, (1901) 84 L. T. 765; overhanging trees, *Lenmon v. Webb*, [1894] 3 Ch. 1; on appeal, [1895] A. C. 1; *Smith v. Giddy*, [1904] 2 K. B. 448.

(*q*) Non putare se, ex tabernâ caseariâ fumum in superiora ædificia jure immitti posse, nisi ei rei servitutem talem admittit. Idemque ait, et ex superiore in inferiora non aquam, non quid aliud immitti licet. In suo enim alii hactenus facere licet, quatenus nihil in alienum immittat; fumi autem, sicut aquæ, esse immissionem; posse igitur superiorem cum inferiore agere, “jus illi non esse id ita facere.”—Dig. 8, 5, 8, § 5, si serv. vind.

Ergo per contrarium agi poterit, “jus esse fumum immittere.” Sed et interdictum “uti possidetis” poterit locum habere, si quis prohibeatur, qualiter velit suo uti.—*Ibid.*

Nam et in balineis (inquit) vaporibus cum Quintilla cuniculum pergentem in Ursi Julii instruxisset, placuit, potuisse tales servitutes imponi.—*Ibid.*—*Ibid.* § 7.

(*r*) Apud Pomponium dubitatur an quis possit ita agere, “licere fumum non gravem, puta ex foco, in suo facere,” aut “non licere.” Et ait magis non posse agi: sicut agi non potest, “jus esse in suo ignem facere, aut sedere, aut lavare.”—*Ibid.* § 6.

(*s*) Action upon the case for a Nuisance (C).

Doctrine of convenience.

though it be to the annoyance of his neighbour." No authority is cited (*t*).

This appears, however, to refer rather to the amount of annoyance requisite to give a right of action at all for a nuisance than the right to cause one; [and with this interpretation the later cases, except that of *Hole v. Barlow* (*u*), agree.

*Hole v. Barlow.*

In the case last mentioned the defendant burnt bricks within a short distance of the plaintiff's house. The learned judge, at the trial of an action for the nuisance thereby occasioned, left to the jury the questions, first,—was the place where the bricks were burnt a proper and convenient place for the purpose? and, *if not*, was the nuisance such as to make the enjoyment of life and property uncomfortable? The jury found for the defendant; and in discharging a rule for a new trial on the ground of misdirection, Crowder, J., said that the direction was *consistent with all the authorities*, and the Court would be in effect overruling several if they were to make the rule absolute.

No authorities were cited by the Court except the passage from Comyns above mentioned; but it may be observed that the direction is opposed to the opinions expressed by the judges in *Bliss v. Hall* and *Elliotson v. Feetham*, in both of which it is laid down by the Court, that twenty years' user is required in order to deprive a neighbour of his remedy for the nuisance caused by carrying on an offensive trade, and no trace of the doctrine is to be found in them, that no user is required if the place be a "proper and convenient" one.

No reference was made by the Court to the case of *Walter v. Selfe* (*x*), nor to the judgments in the two other cases already referred to; and it cannot be disputed that a direct conflict of

(*t*) [The authority for the passage in Com. Dig. is probably 2 Roll. Abr. 139, Nuisance, F. pl. 2. "If a man makes candles in a vill, by which he causes a noisome smell to the inhabitants, still this is no nuisance, for the needfulness of them shall dispense with the noisomeness of the smell, 3 Jac. B. R. *Rankett's Case* adjudged." (Vin. Abr. Nuisance, F. pl. 2.) Hawkins questions the reasonableness of this opinion. (P. C. bk. 1, c. 32, s. 10, vol. 1, 694, Curwood's edit.)

Or he may refer to Anon. (1 Vent. 26): "It was said that a man ought not to be punished for the erecting of anything necessary for his lawful trade, but it was answered that this ought to

be in a *convenient place where it may not be a nuisance*. For Twisden said he had known of an injunction for erecting of a brew-house near Serjeants' Inn; but the other justices doubted and agreed that it was unlawful only to erect such things near the King's palace."

The places where trade could be carried on in towns appear formerly to have been regulated by bye-law. See pl. 34, E. 15 Car.; *Player v. Jenkins*, 1 Sid. 284; B. R. P. 18 Car. 2; Vin. Abr. Bye-laws, B. pl. 16; 1 Russell on Crimes, p. 440.]

(*u*) (1858), 4 C. B. N. S. 334.

(*x*) (1861), 4 De G. & Sm. 315; 87 R. R. 393.

[opinion existed upon the question, whether a man has a right to cause noxious matters to flow on to his neighbour's land to such an extent as to render the enjoyment of life and property substantially uncomfortable, in any case except that in which an easement has been acquired entitling him to do so.

Doctrine of  
convenience.

*Hole v.  
Barlow.*

From the report of *Hole v. Barlow*, it does not appear upon which of the questions left to them the jury found their verdict; but, although from the judgments delivered in that case, it appears that the judges were not of opinion that this was material, the effect of the actual decision is quite altered by the fact mentioned by Martin, B., in his judgment in *Stockport Waterworks Co. v. Potter (y)*, namely, that the jury in fact found that there was no nuisance.

The real effect of the plaitum in Comyns' Digest, already cited, p. 455, is shown in the interpretation of the word "convenient," adopted by Hide, C. J., in Palmer's Rep. 539, and Martin, B., in *Stockport Waterworks Co. v. Potter*, ubi sup., according to which "convenient place" means a place where a nuisance will not be caused to another; and the authorities in which the locality has been spoken of as material in determining the question of nuisance or no nuisance are perfectly consistent with this interpretation. Upon the question of fact, whether a nuisance has been caused by the defendant at all, the nature of the locality, like every other fact in the case, must be taken into consideration; but that question really is, whether the act of the defendant renders the enjoyment of life and property by the plaintiffs uncomfortable, and if this be found in the affirmative, it should seem conclusive of the right to recover, whatever the locality; and the great inconvenience and insecurity which would result if this were not so are obvious (z).

Real meaning  
of the  
doctrine.

In *Beardmore v. Treadwell (a)*, Stuart, V.-C., granted an injunction against brick-burning. He said, "Where a man is injuring his neighbour to a very material extent in a way not absolutely necessary, this Court is always disposed to interfere. In such cases the balance of convenience must be attended to. Upon the result of the evidence it is proved that there has been an actual and positive injury to the plaintiff, and that the comfort and enjoyment

*Beardmore v.  
Treadwell.*

(y) (1861), 7 H. & N. 160.

(z) See also the judgment of Wood, V.-C., in *Att.-Gen. v. Birmingham*

*Borough Council* (1858), 4 K. & J. 528.

(a) (1863), 9 Jur. N. S. 272; 3 Giff. 683.

Doctrine of  
convenience.

*Beardmore v.  
Treadwell.*

[of her mansion have been disturbed; that the ornamental trees planted to exclude the appearance of unsightly objects have in some cases been destroyed, and in many cases injured." As to the ruling of Byles, J., in *Hole v. Barlow*, "that no action lies for the reasonable use of a lawful trade in a convenient and proper place," he observes, "in this exposition of the law, the words 'convenient and proper' must be taken subject to some qualification; nobody will doubt that to the brick-burner the place may be convenient, and probably the most convenient place that can be found, but it is clear that the place being convenient to one party is not enough to justify the continuance of the acts if they make the enjoyment of life and property uncomfortable to the other, especially if they can be done elsewhere without these injurious consequences following. The words therefore, 'convenient and proper,' must be used with reference to the situation of both parties."

*Bamford v.  
Turnley.*

In *Bamford v. Turnley* (b), another brick-burning case, Cockburn, C. J., on the authority of *Hole v. Barlow*, directed the jury that if they thought the spot was convenient and proper, and the burning of the bricks was, under the circumstances, a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict, independently of the question whether there was an interference with the plaintiff's comfort thereby; and a verdict was entered for the defendant. On appeal to the Exchequer Chamber, the direction was held to be improper, the verdict was set aside, and a verdict entered for the plaintiff, for 40s. The majority of the Court (Erle, C. J., Williams and Keating, JJ., and Wilde, B.) held, that *Hole v. Barlow* was not well decided, and that the words "convenient place," in the passage in Com. Dig., meant a place where a nuisance would not be caused to another, in conformity with the observations in the above passage (p. 457); and that the law was, that a man might, without being liable to an action, exercise a lawful trade, as that of a butcher or brewer, or the like, notwithstanding it was carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade were so conducted that it did not cause what amounted in point of law to a nuisance to the neighbouring house. Pollock, C. B., dissented from the judgment. The parties afterwards agreed to enter a *stet processus*.

(b) (1860), 3 B. & S. 62.

[In *Carey v. Ledbitter* (c), Wightman, J., refused to leave to the jury the question whether the place where the defendant burned the bricks was a convenient and proper place for the purpose, but left it to them to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs, &c. had been thereby injured. The plaintiff obtained a verdict for £20. The Court held the judge's direction correct. Erle, C. J., said that the Court in *Bamford v. Turnley* only decided that the form of question adopted in *Hole v. Barlow* was wrong. He observed, that the affairs of life in a dense neighbourhood could not be carried on without mutual sacrifices of comfort, and in all actions for discomfort the law must regard the principle of mutual adjustment; that the notion, that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances, was as untenable as the notion, that if the act complained of was done in a convenient time and place, it must therefore be justified, whatever the degree of annoyance that was occasioned thereby; and that the judgment of Willes, J., in *Hole v. Barlow*, appeared to him to be sound.

Doctrine of  
convenience.

*Carey v.*  
*Ledbitter.*

In *Tipping v. St. Helen's Smelting Co.* (d), an action for a nuisance by noxious fumes from a smelting-house, Mellor, J., directed the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbour, unless he has acquired a prescriptive right to do so; but that the law does not regard trifling inconveniences. Everything must be looked at from a reasonable point of view, and therefore, in an action of nuisance to property from noxious vapours, the injury, to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In determining that question, time, locality, and all the circumstances must be taken into consideration. In places where great works had been erected and carried on, which were the means of developing the national wealth, persons must not stand on extreme rights and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in such places. The defendant complained of the direction, but the Courts of Queen's Bench and Exchequer Chamber held it to be correct; and Cockburn,

*Tipping v.*  
*St. Helen's*  
*Smelting Co.*

(c) (1863), 13 C. B. N. S. 470.

(d) (1863), 4 B. & S. 608.

Doctrine of  
convenience.

*Tipping v.  
St. Helen's  
Smelting Co.*

[C. J., said that it was not a right question to put to the jury to say whether the place where the act was done was a proper and convenient one for the purpose, or whether the doing of it in that place was a reasonable use of the defendant's land, and that it was inconsistent with sound reason to say that the matter could be considered with reference to the interest of the public. Without compensation, an individual was not precluded from redress for private injury on account of a benefit to the public arising from that injury. The judgment was affirmed by the House of Lords (e).

*Reinhardt v.  
Mentasti.*

In *Reinhardt v. Mentasti* (f), where the defendant had put up a stove, the heat of which rendered the cellar of the plaintiff's house unfit for storing wine, Kekewich, J., examined the authorities on this point, and held it to be no answer to the case that the defendant was making a reasonable use of his own property.

*Sanders-Clark  
v. Grosvenor  
Mansions Co.,  
Ltd.*

In *Sanders-Clark v. Grosvenor Mansions Co., Ltd.* (g), it was held that in considering cases of nuisance the Court will have regard to whether the person alleged to have created the nuisance is making a reasonable use of his property. But this means reasonable, not from his own point of view only, but having regard to the character of the neighbourhood and the surrounding circumstances (h).

*Att.-Gen. v.  
Corporation of  
Manchester.*

In *Att.-Gen. v. Corporation of Manchester* (i), where an action was brought to restrain the erection of a small-pox hospital as a public nuisance, it was held that there was no sufficient evidence to justify "a well-founded and reasonable apprehension of danger," and the injunction was refused on the facts. Chitty, J., added that "in the case where the health of the Queen's subjects in general is concerned, it may possibly be a question whether, if the evidence shows that the maintenance of a small-pox hospital is on the whole, balancing the good against the evil, more beneficial to the health of the public at large, or to that portion of the public that inhabits and frequents the neighbourhood, than the leaving of the persons suffering from the disease scattered in their own houses, some weight might not be properly allowed to this circumstance"; but he expressly refrained from

(e) 11 H. L. C. 642, *St. Helen's Smelting Co. v. Tipping*.

(f) (1889), L. R. 42 Ch. D. 685.

(g) [1900] 2 Ch. 373.

(h) *Att.-Gen. v. Cole & Son*, [1901] 1 Ch. 205.

(i) [1893] 2 Ch. 87.

[making this consideration any ground for his decision. It is to be noted that the case was one of public and not private nuisance.

Doctrine of convenience.

To the same effect was *Att.-Gen. v. Nottingham Corporation* (k), where it was sought to restrain the use of a newly-erected building as a smallpox hospital. No case of injury had arisen, and the action was quia timet. It was held by Farwell, J., that, in the conflicting state of medical opinion upon the point, the establishment of a small-pox hospital, properly managed, could not of itself be considered so serious a danger as to support a quia timet action.

*Att.-Gen. v. Nottingham Corporation.*

It is no answer to a claim for an injunction against a nuisance for fouling water that the water is already fouled by others, who have a right to do so. "The circumstance of the plaintiff buying up these rights (he had bought up some but not all) indicates the soundness of the rule of law which has been laid down in the House of Lords in the case of *St. Helen's Smelting Co. v. Tipping*, namely, that you cannot justify an additional nuisance in the case of smoke, if it can be clearly traced to your new chimney, on the ground that the plaintiff has had a great many nuisances to encounter before. If the nuisances which he has had to encounter before have been such that it is impossible to trace any evil to the work you are conducting with your new chimney, possibly the case may be otherwise; though even then it must be seen how unreasonable it would be to allow such an excuse, because the circumstance that a person who is so injured can buy up those who have acquired rights against him is no reason why he should be compelled to submit to your additional nuisance until he has bought up all the rest" (l).

Other existing nuisances.

And in *Rushmer v. Polsue and Alfieri, Ltd.* (m), it was held actionable to subject an occupier of a house in a locality devoted to noisy trades to such an increase of noise as to interfere substantially with the ordinary comfort of human existence, according to the standard prevailing in the locality.

*Rushmer v. Polsue and Alfieri, Ltd.*

But the damage must be sensible, substantial, and actual; and the Court will not take into account, contingent, prospective, or remote danger. "The law does not take notice of the imperceptible accretions to a river-bank or to the sea-shore, although after a lapse of years they become perfectly measureable and

Damage must be substantial.

(k) [1901] 1 Ch. 673.

L. R. 3 Eq. 409; 17 L. T. N. S. 133.

(l) *Crossley v. Lightowler* (1866), L. R. 3 Eq. 289, per Wood, V.-C.; 2 Ch. Ap. 478. See also *Crump v. Lambert* (1867),

(m) [1906] 1 Ch. 234; aff. [1907] A. C. 121.



Damage  
must be  
substantial.

[ascertainable; and if, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not afford a ground for interfering, although after the lapse of a million minutes the grains of poison or the grains of dust could be easily detected. It would have been wrong, as it seems to me, for this court in the reign of Henry VI. to have interfered with the further use of sea-coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common sea-port and ship-building town, which would drive the Dryads and their masters from their ancient solitudes" (n).]

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(n) Per James, L. J., in *Salvin v. North Brancepeth Coal Co.* (1874), L. R. 9 Ch. 705.

## CHAPTER VI.

## PARTY WALLS AND FENCES.

ALTHOUGH, strictly speaking, the rights and liabilities of the owners of property adjoining to a party-wall relate principally to the doctrine of tenancy in common, yet some of the rights exercised over it partake of the character of easements.

Party-walls  
presumed to  
be in common.

The common user of a wall adjoining lands belonging to different owners is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties, as tenants in common (*a*).

Where the precise extent of land originally belonging to each owner can be ascertained, the presumption of a tenancy in common does not arise, but each party is the owner of so much of the wall as stands upon his own land (*b*).

Presumption  
rebutted.

In the latter case, there seems no authority for saying that the rights of the respective owners of the portions of the wall differ from those of the proprietors of any other two walls which abut on each other: unless prevented by some easement having been acquired, either party would be at liberty to pare away or even entirely to remove his portion, notwithstanding the other half might be unable to stand without the support of it (*c*). At the utmost, the fact of the close union of the walls could only impose

(*a*) *Cubitt v. Porter* (1828), 8 B. & C. 257; 32 R. R. 374, and note, p. 259; *Wiltshire v. Sidford* (1827), 1 M. & Ry. 404; 31 R. R. 329; [*Watson v. Gray* (1880), L. R. 14 Ch. D. 192. In *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508, an order for partition of a party wall was made.]

(*b*) *Matts v. Hawkins* (1813), 5 Taunt. 20; 14 R. R. 695. [Cf. *Murly v. McDermott* (1838), 8 A. & E. 138. Where an estate had been laid out in building plots and sold under stipulations in the conveyances to the effect that the purchaser of a plot first building a party wall (the middle of which was to be the boundary between that plot and the adjoining one) should be

paid by the purchaser of the adjoining plot one-half the value of the party-wall, it was held that there was an implied contract on the part of a purchaser using a party-wall erected by the predecessor in title of the owner of an adjoining plot to pay to the owner of the adjoining plot half the cost of that party-wall, although the wall had, in fact, been built, not by such owner, but by his predecessor in title. *Irving v. Turnbull*, [1900] 2 Q. B. 129.]

(*c*) *Wigford v. Gill* (1592), Cro. Eliz. 269; 8 B. & C. 264; 32 R. R. 374. Cf. per Parker, J., in *Jones v. Pritchard*, reported in Times Newspaper, Feb. 7th, 1908.

Presumption rebutted.

a duty of greater caution than might otherwise be required in removing the materials. "If," said Bayley, J., "the wall stood partly on one man's land and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two" (*d*).

In general, however, party-walls will be found "to be built on the common property of the two, and to be the common property of both;" and, in the absence of any further proof than that which is afforded by evidence of a common user, such will be presumed to be the case.

A wall may be a party-wall up to a certain point, namely, so far as it divides two buildings of unequal height, and an external wall above that point (*e*); and a pilaster or portico, or a fascia, which appears to form an integral portion of one house, may be parcel of and pass on a conveyance of another house (*f*).

Rights of co-owners.

Where a wall is a party-wall, neither of the tenants in common may oust his co-tenant from the use of it (*g*); but each of them has the right to repair it without the obligation to do so (*h*).

London Building Act.

In the metropolis, party-walls are regulated by the provisions of the London Building Act, 1894 (*i*).

Banks separating fields.

In the case of banks, &c., separating fields, the ownership is thus determined:—If two fields are separated by a ditch and bank, the bank and ditch, *prima facie* and in the absence of proof

(*d*) *Cubitt v. Porter* (1828), 8 B. & C. 257; 32 R. R. 374. See on this point, *Bradbee v. Christ's Hospital* (1842), judgment of Tindal, C. J., 4 M. & G. 761.

(*e*) *Weston v. Arnold* (1873), L. R. 8 Ch. 1084; *Drury v. Army and Navy Auxiliary Co-operative Supply*, [1896] 2 Q. B. 271; *Carlisle Café Co. v. Muse* (1897), 46 W. R. 107. Cf. *Johnston v. Mayfair Property Co.*, W. N. (1893), p. 73.

(*f*) *Thrupp v. Scrutton* (1872), 7 W. N. 60; *Fox v. Clarke* (1874), L. R. 9 Q. B. 565; *Francis v. Hayward* (1882), L. R. 22 Ch. Div. 177. Cf. *Reilly v. Booth* (1890), L. R. 44 Ch. Div. 12; *Laybourn v. Gridley*, [1892] 2 Ch. 63.

(*g*) See *Stedman v. Smith* (1857), 8 E. & B. 1; 26 L. J. Q. B. 314; 21 Jur. 1248; *Watson v. Gray* (1880), L. R. 14 Ch. D. 192; *Hughes v. Percival* (1883), L. R. 8 App. Cas. 443; and cf. *Leigh v. Dickeson* (1884), L. R. 15 Q. B. Div. 60. Neither is a trustee for the other. *Kennedy v. De Trafford*, [1897] A. C. 180.

(*h*) *Colebeck v. Girdlers' Co.* (1876), L. R. 1 Q. B. D. 234; *Standard Bank of British South America v. Stokes* (1878), L. R. 9 Ch. D. 68. Cf., as to the civil law, Dig. 8, 2, 8, 19, 20.

(*i*) 56 & 57 Vict. c. cccxiii. Part 8; see *Pratt v. Hillman* (1825), 4 B. & C. 263; *Wheeler v. Gray* (1859), 6 C. B. N. S. 606; *Major v. Park Lane Co.* (1866), L. R. 2 Eq. 453; *Crofts v. Haldane* (1867), L. R. 2 Q. B. 194; *Standard Bank of British South America v. Stokes*, *ubi sup.*; *Knight v. Pursell* (1879), L. R. 11 Ch. D. 412; *Fillingham v. Wood*, [1891] 1 Ch. 61; *Crow v. Redhouse* (1895), 59 J. P. 663; *Drury v. Army and Navy Auxiliary Co-operative Supply*, [1896] 2 Q. B. 271; *List v. Tharp*, [1897] 1 Ch. 260; *Hobbs, Hart & Co. v. Grover*, [1899] 1 Ch. 11; *In re Stone and Hastie*, [1903] 2 K. B. 463; *Orf v. Payton*, [1905] 21 T. L. R. 90; 69 J. P. 103; *Lewis and Salomon v. Charing Cross, Euston, and Hampstead Railway*, [1906] 1 Ch. 508; *Crosby v. Alhambra Co., Ltd.*, [1907] 1 Ch. 295.

[to the contrary (*k*), are presumed to belong to the owner of the field immediately adjoining the bank; but if there be a bank with ditches at each side of it, then there is no presumption as to the ownership of the bank, and the question must be determined by acts of ownership (*l*).]

The only general obligation with respect to fences imposed by the common law is, that every proprietor of land should prevent, by fences or other means, his cattle from trespassing on the land of his neighbours (*m*). Obligation to keep in cattle.

There may, however, be a spurious kind of easement obliging an owner of land to keep his fences in a state of repair, not only sufficiently to restrain his own cattle within bounds, but also those of his neighbours (*n*); and rendering them liable for any injury which his neighbour's cattle may sustain in consequence of the non-repair of the fences,—which, unless an easement had been acquired, he clearly would not be. This liability is confined to the cattle of his neighbour, or such as are rightfully on the adjoining land, and does not extend to all cattle whatsoever, though they may have entered through the land of the party towards whom this obligation to keep the fences in repair legally exists (*o*). Spurious easement, to repair.

“If the cattle of one man escape into the land of another, it is

(*k*) *Marshall v. Taylor*, [1895] 1 Ch. 641; *Earl of Craven v. Fildmore* (1902), 18 T. L. R. 282; *Henniker v. Howard*, [1904] 90 L. T. 157; *Simcox v. Yardley Rural Council* (1905), 69 J. P. 66.

(*l*) Bayley, J., in *Guy v. West*, cited in 2 Selwyn, N. P. 1297, 12th edit. See the explanation of this given by Lawrence, J., in *Vowles v. Mellor* (1810), 3 Taunt. 137—8; and by Holroyd, J., in *Doe d. Pring v. Pearsey* (1827), 7 B. & C. 307; 31 R. R. 209.

(*m*) [Dyer, 372 b; 1 Wms. Saunders, 322 a; 1 Notes to Saund. 559; *Hilton v. Ankersson* (1872), 27 L. T. Rep. N. S. 519. Cf. *Erskine v. Adeane* (1873), L. R. 8 Ch. 756; and see the Year Book, 20 Edw. 4, 10, as to duty of commoners. As to the duty of a copyhold tenant to keep his boundaries distinct, see *Searle v. Cooke* (1889), L. R. 43 Ch. Div. 519.]

(*n*) Per Bayley, J., in *Boyle v. Tamlyn* (1827), 6 B. & C. 337—339; 30 R. R. 343; *Star v. Rookeby* (1711), 1 Salk. 335; [*Laurence v. Jenkins* (1873), L. R. 8 Q. B. 274].

(*o*) [See the judgment of Parsons, C. J., in *Rust v. Low*, 6 Mass. 90, in which the same view of the law is taken, and the whole question and the autho-

rities upon it examined and explained.

The like rule applies in the case of the liability to maintain fences thrown upon railway companies by the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 68. *Ricketts v. East and West India Docks, &c. Rail. Co.* (1852), 12 C. B. 160; *Manchester, Sheffield, and Lincolnshire Rail. Co. v. Wallis* (1854), 14 C. B. 213. See also, as to this liability, *Bessant v. G. W. R.* (1860), 8 C. B. N. S. 368; *Marfell v. South Wales Railway* (1860), 8 C. B. N. S. 525; *Buxton v. N. E. R.* (1868), L. R. 3 Q. B. 549; *Jawson v. M. R.* (1872), L. R. 8 Exch. 8; *Child v. Hearn* (1874), L. R. 9 Exch. 176; *Wiseman v. Booker* (1878), L. R. 3 C. P. D. 184; *Corry v. G. W. R.* (1881), L. R. 7 Q. B. Div. 322; *Dixon v. Great Western Rail. Co.*, [1897] 1 Q. B. 300.

In some cases, as in *Fawcett v. York and N. M. Rail. Co.* (1851), 16 Q. B. 610; 83 R. R. 630, particular statutes impose on railway companies a duty of keeping parts of the line guarded against all persons and cattle on the adjacent land, whether lawfully there or not; but the general liability is as above stated.]

Spurious  
easement, to  
repair.

not any excuse that the fences were out of repair, if the cattle were trespassers on the close from whence they come." Per Heath, J., in *Doraston v. Payne* (p).

Anon.,  
1 Vent.

In an anonymous case reported in Ventris (q), the plaintiff declared that the defendants were bound to maintain a certain fence, and that, by reason of their neglect to do so, a mare of the plaintiff's escaped through the fence, and was drowned in a ditch. After verdict for the plaintiff, on motion in arrest of judgment the Court held, that the plaintiff was entitled to recover.

*Rooth v.*  
*Wilson.*

In *Rooth v. Wilson* (r), where a person to whom a horse had been sent turned it into a pasture, and by the defect of the fence, which the neighbouring owner was bound to repair, it fell down into the neighbouring close and was killed; the liability of the defendant for the consequences of his neglect in not repairing was not disputed, the only point made being, that the bailee could not maintain the action (s).

*Singleton v.*  
*Williamson.*

[In *Singleton v. Williamson* (t) a man had distrained, damage feasant, cattle which had escaped from a close through defect of a fence which he himself ought to have repaired, and had ultimately strayed into his close, and the Court held that he was wrong, the trespass being the natural consequence of his own neglect of duty.

The fact of the tenants of land enclosed by a fence always having repaired it is some evidence of an obligation to do so; and the evidence of obligation is strengthened if the land was originally enclosed from a common. When the privilege of inclosure was granted by the lord, it is unlikely that he would impose on the rest of his commoners the obligation of building and maintaining a fence, or that he would himself undertake the duty of doing so; and to take such a concession without imposing such a duty on the party benefited would be an injustice to the commoners (u).

The obligation is absolute, to maintain at all times a sufficient fence without notice to repair, except in the case of damage by the act of God or vis major. If the fence is broken by a stranger,

(p) (1795), 2 H. Bl. 527; 3 R. R. 497; Preface V.; vide etiam per Wilmot, C. J., 3 Wilson, 126.

(q) Vol. 1, p. 264.

(r) (1817), 1 B. & Ald. 59; 18 R. R. 431.

(s) See also *Powell v. Salisbury* (1828), 2 You. & Jer. 391; 31 R. R. 607; [*Lee v. Riley* (1865), 18 C. B. N. S. 722].

(t) (1861), 7 H. & N. 410.

(u) *Barber v. Whitely* (1865), 11 Jur. N. S. 822; 34 L. J. Q. B. 212.

[and the servient owner has no notice of it, he is answerable for damage to cattle escaping into the dominant close and proximately due to that cause (*x*).

Spurious  
easement, to  
repair.

The trustees of a turnpike road are not bound to fence a road made by them, unless there is a special provision in their Act to that effect, although they have made fences and kept them in repair for many years (*y*). But if their Act directs fences to be made and repaired, they are the parties to make and repair, unless the burden is expressly imposed on some one else (*z*).

Turnpike  
trustees.

The General Inclosure Act, 1845, also contains regulations as to fencing (*a*).

Inclosure Act.

The liability to repair fences is not affected by Lord Tenterden's Act, that Act not applying to mere duties (*b*).

The remedy in these cases is against the occupier of the land (*c*). Remedy.

Unity of possession would of course have the same effect in this as in the case of a regular easement (*d*); and if a man bound to repair as against his neighbour were to take a lease of the latter's close and then to sublet it, the sub-lessee would have no remedy against his landlord for not repairing.]

Analogous to this liability arising from neglect to do what the party was bound to do, is that incurred by a party doing some positive act, as driving or enticing into his property the animals of his neighbours, so that they sustain injury thereby.

Liability for  
driving or  
enticing  
animals.

Thus in *Townsend v. Wathen* (*e*), where the defendant set traps baited with strong-smelling flesh so near the edge of his property, as thereby to entice the plaintiff's dogs in the neighbouring close, which were caught in the traps and wounded, it was held that the defendant was liable. Lord Ellenborough said: "Every man must be taken to contemplate the probable consequences of the act he does. And, therefore, when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all dogs coming

*Townsend v.*  
*Wathen.*

(*x*) *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274.

(*y*) *Rex v. Llandilo* (1788), 2 D. & E. 232; 1 R. R. 466.

(*z*) *Merivale v. Exeter* (1868), L. R. 3 Q. B. 149.

(*a*) Sect. 8.

(*b*) See per Williams, J., in *Peter v. Daniel* (1848), 5 C. B. 573.

(*c*) *Cheetham v. Hampson* (1791), 4 T. R. 318; 2 R. R. 397; 1 Wms. Saund. 322; 1 Notes to Saund. 559.

(*d*) Above, p. 18.

(*e*) (1808), 9 East, 277; 9 R. R. 553.

Spurious  
easement, to  
repair.

*Townsend v.  
Wathen.*

accidentally within the sphere of the attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force?"

Liability for  
damage to  
persons or  
cattle  
trespassing.

Where, however, no such obligation to repair exists, it seems, though there are authorities throwing doubt on the point, that the owner of the land is not liable for injury sustained by cattle which are trespassing upon his property.

"If A., seised of a waste adjoining a highway, dig a pit in the waste within thirty-six feet of the said way, and the mare of B. escape into the said waste, and fall into the said pit, and there die, still B. shall not have any action against A., for that the making of the pit in the waste and not in the highway, was not any tort to B., but that it was by the default of B. himself that his mare escaped into the waste" (d).

*Sarch v.  
Blackburn.*

So, in *Sarch v. Blackburn* (e), an action was brought "for knowingly keeping a ferocious dog accustomed to bite mankind, and which bit the plaintiff." The plaintiff was a watchman of the parish, and was bitten as he was going in the middle of the day to the defendant's house by a back way, which the defendant contended was a private way for himself and family only.

The plaintiff was alone at the time, and there was no evidence of the reason of his being in the place where he was bitten. There was a notice, "Beware of the dog," but the plaintiff could not read.

(d) *Blyth v. Topham* (1608), 1 Rolle's Abr. 88, Action on Case, N., Nusans, pl. 4; S. C., Cro. Jac. 158; see also *Brock v. Copeland* (1794), 1 Esp. 203; 5 R. R. 730. [In accordance with the principle of this case is *Hardcastle v. South Yorkshire Rail. Co.*, above, p. 437; and it is also recognized in *Barnes v. Ward*, above, p. 434, which shows that where the excavation immediately adjoins the footway, so as to amount to a nuisance, the owner would be liable; and in *Hounsell v. Smyth* (1860), 7 C. B. N. S. 731, where it was held, that the owner of unenclosed land, over which the public are permitted by him to ramble without interference, is not bound to fence ex-

cavations in it, as every one using land under such circumstances must take the permission with its concomitant perils. It would be otherwise, however, in case of a man holding out any direct inducement or invitation to another to go by a path across his land; for in such a case he would be bound either to warn or guard the other against dangerous obstructions or pitfalls placed or continued by him in the path. See also the Highway Act, 5 & 6 Will. 4, c. 50, s. 70, as to excavations near highways within the Act; and *Mason v. Baird* (1878), 26 W. R. 835.]

(e) (1830), Moo. & Mal. 505; 4 C. & P. 297; 34 R. R. 805.

Tindal, C. J., left it to the jury to say on which side there was negligence. "If the plaintiff was negligent, if he was where he ought not to have been, or if he neglected means of notice, he cannot recover; if the defendant placed the dog where he might injure persons, not themselves in fault, he is responsible.

Liability for  
damage to  
persons or  
cattle  
trespassing.

*Sarch v.  
Blackburn.*

"The plaintiff certainly is not entitled to recover in this action, if he was injured by his own fault. There is no evidence to show why the plaintiff was on the spot in question, whether with a lawful or unlawful object. The law, however, would rather presume a lawful object; and there is no improbability in his having one, for he was on one of the ways to the house itself at mid-day, although certainly it was not the most public and usual way. If he was lawfully there, I do not think the mere fact of the defendant's having put up the notice relied on would deprive him of his remedy. The mere putting up the notice is not sufficient for this, unless the party injured is at least in such a condition as to be able to become cognizant of its contents. The plaintiff could not read; the notice, therefore, furnished no information to him; and there were no circumstances in the way in which the dog was kept to apprise him of the danger. If, therefore, he had a right to be where he was, I see no fault or negligence in him to deprive him of his remedy. Still the defendant will not be liable unless he is in fault; unless he knows the character of the dog, which he certainly did in this instance, and unless he keeps it improperly with that knowledge. The mere putting up the notice does not, I think, in this case excuse him. But it is said, that he has a right to keep a fierce dog to protect his property. He certainly has so; but not, in my opinion, to place it on the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. If the dog was placed in such a situation that he could injure the plaintiff, ignorant of the notice, and going for a lawful purpose to the house by a way which he was entitled to use, I think the defendant would not be protected from this action."

In *Jordin v. Crump* (f), it was held, that a man might lawfully place dog-spears on his own land, having a public footpath running across it, and that he would not be liable for damage inflicted by them on dogs deviating from the footpath, though they

*Jordin v.  
Crump.*

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(f) (1841), 8 M. & W. 782. The existence of the dog-spears, but the plaintiff had been given notice of the Court said that made no difference.



Liability for  
damage to  
persons or  
cattle  
trespassing.

*Jordin v.  
Crump.*

belonged to persons lawfully using the path. "Now in the present case," said Alderson, B., in delivering the judgment of the Court, "the injurious act was done by the dog to the land of the defendant; and it is no answer to say that the plaintiff could not control the animal, and was therefore unable to guard against that danger. If he chose to walk with his dog along a footpath through ground on which a dog might commit a trespass, he knew the risk he was running; and the case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it. In such a case, the party digging the pit would be responsible for the injury, if the pit were dug across the road; but if it were only in an adjacent field the case would be very different, for the falling into it would then be the act of the injured party himself" (g). The Court then cite and recognize the case above given of *Blyth v. Topham* (h), and say, "that case, therefore, is an authority that the fact of a trespass being involuntary makes no difference in this respect."

Damage by  
ferocious  
animals to  
trespassers.

The cases, some of which appear at first sight to be in opposition to this doctrine (i), are instances in which a party has resorted to the use of some dangerous engine or ferocious animal for the preservation of his property, and has thus done indirectly what the law would not allow him to do by his own hand, unless it were absolutely necessary to preserve his property from immediate injury (k). These decisions are at the best very doubtfully expressed; they appear to be overruled to some extent by the above case of *Jordin v. Crump*; and it is decided at all events that if the party injured had express notice, and nevertheless persisted in committing the trespass, he can obtain no redress, but must take the consequences of his own act (l).

Escape.

[These cases must be distinguished from cases of "escape," whether of water (m), soil (n), or dangerous or poisonous substances (o).]

(g) [See *Barnes v. Ward*; *Hardcastle v. South Yorkshire Railway and River Dun Co.*; *Hounsell v. Smyth*, ante, p. 468, n. (d).]

(h) 1 Rol. Abr. 88.

(i) *Deane v. Clayton* (1817), 7 Taunt. 489; 18 R. R. 553; *Bird v. Holbrook* (1820), 4 Bing. 628; 29 R. R. 657, Preface IX.

(k) *Vere v. Lord Cawdor* (1809), 11 East, 668; 11 R. R. 268, Preface VIII.;

*Janson v. Brown* (1807), 1 Camp. 41; 10 R. R. 626; *Corner v. Champneys* (1814), cited 2 Marshall, 584.

(l) *Ilott v. Wilkes* (1820), 3 B. & Ald. 304; 22 R. R. 400, Preface VII.

(m) *Eylands v. Fletcher* (1863), L. R. 3 H. L. 330.

(n) *Hurdman v. N. E. R.* (1878), L. R. 3 C. P. Div. 168.

(o) *Firth v. Bowling Iron Co.* (1878), L. R. 3 C. P. D. 254.

There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted on his neighbour's soil. Easement for roots of trees.

The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it.

Supposing no easement to exist, there seems nothing to take this out of the ordinary rule, that a man may abate any encroachment upon his property, and therefore that he may cut the roots of a tree so encroaching in the same manner that he may the overhanging branches (*p*).

The decided cases bearing upon this subject have turned rather upon the question of property in trees growing upon the limits of two adjoining heritages, than upon the question of easement. Ownership of boundary trees.

*Masters v. Pollie* (*q*) was an action "of trespass quare clausum fregit, et asportavit the plaintiff's boards." The defendant justified, "That there was a great tree which grew between the close of the plaintiff and that of the defendant, and that part of the roots of the tree extended into the close of the defendant, and were nourished by his soil; that the plaintiff cut down the tree, and carried it into his own close and sawed it into boards, and the defendant entered and took and carried away some of the boards, prout ei benè licuit." The plaintiff demurred to this plea, and it was contended that the plea was bad, for although some of the roots of the tree are in the defendant's soil, yet the body (*le corps del maine parte*) of the tree being in the plaintiff's soil, therefore all the residue of the tree belongeth to him likewise. And of this opinion is Bracton; but if the plaintiff had planted a tree in the soil of the defendant, it shall be otherwise, *quod curia concessit*; but Mountague, C. J., said, "That the plaintiff cannot limit the roots of the tree, how far they shall go." *Masters v. Pollie.*

In an anonymous case reported in the same volume, it is said (*s*), "If a tree grow in a hedge which divides the land of A. and B., and by its roots take nourishment in the land of A. and

(*p*) 1 Rol. Rep. 394; *Norris v. Baker* (1613), per Croke, J.; and see post, p. 473.

(*q*) (1620), 2 Rolle, Rep. 141.  
(*s*) P. 255.

Ownership of boundary trees. also of B., they are tenants in common of the tree; and so it was adjudged."

*Waterman v. Soper.*

In *Waterman v. Soper* (t), "It was ruled by Holt, C. J., at Lent Assizes, at Winchester, upon a trial at Nisi Prius, 1697-8: 1st, That if A. plant a tree upon the extremest limits of his land, and the tree growing extends its roots into the land of B. next adjoining, A. and B. are tenants in common of this tree; but if all the roots grow into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A. 2nd, Two tenants in common of a tree, and one cuts the whole tree—though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons."

*Holder v. Coates.*

In *Holder v. Coates* (u), an action of trespass was brought for cutting a tree of the plaintiff. The body of the tree stood in the defendant's land, but some of the lateral roots grew into the land of both parties. The evidence as to the position of the principal root was conflicting.

Littledale, J., referred to the case first above cited, from Rolle's R., and expressed his preference for the law as there laid down over the ruling of Lord Holt in *Waterman v. Soper* (x). The learned judge, in summing up, told the jury that he did not see on what grounds they could find for either party, as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant respectively; "but that the safest criterion for them would be to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil and of the roots within it, they could ascertain where the tree was first sown or planted." Upon the jury saying that they could not tell in whose ground the tree first grew, a verdict was taken by consent.

*Hetherington v. Galt.*

[In *Hetherington v. Galt* (y), a decision of the Court of Session in Scotland, it was held that trees whose stems are wholly on one side of the boundary of two adjoining properties, but which stand so near the boundary as to extend their roots into the other side of it, are not the common property of both proprietors.]

(t) (1697), 1 Lord Raymond, 737.  
(u) (1827), Moo. & Mal. 112; 31 R. R. 724.

(x) (1697), 1 Lord Raymond, 737.  
(y) (1905), 7 F. 706, Mews' Dig. col. 25.

By the Civil Law, the neighbour into whose land the roots of a tree penetrated was not permitted to cut them off, although he might institute a suit to contest the right.

Ownership of  
boundary  
trees.

Civil law.

With regard to the property of a tree, the roots of which extended into two heritages, it would appear that if it derived its nourishment equally from both it became common property. If it drew its nourishment substantially from one heritage only, on whichever side it was originally planted, the property passed to the owner of the land supplying the nourishment (z).

Pothier, in his commentary on the passage of the Digest, that "the tree remains the property of him in whose soil it had its origin," says: "This is so, notwithstanding it is said in the Institutes, that the tree shall be considered his into whose soil the roots are protruded; for this is to be understood of such a protrusion of the roots as to draw all the nourishment for the tree from the neighbouring soil; but if my tree pushes the extremities of its roots only into my neighbour's soil, though it may by that means draw some nourishment therefrom, nevertheless the tree remains mine, because the tree has got its origin and the greater part of the roots in my soil."

The Civil Law appears to agree with the rule as laid down in the anonymous case in Rolle, and in *Waterman v. Soper*, and, consequently, to be at variance with the opinion of Littledale, J.

The French Code contains many minute provisions upon this subject (a).

[With regard to trees standing so near the boundary of a property that their branches overhang the adjoining property, recent decisions have conclusively decided that an encroachment by this means is a nuisance which may be abated by the proprietor injured, or for which an action for damages will lie.

Overhanging  
trees a  
nuisance.

In *Lemmon v. Webb* (b) it was held by the House of Lords that

*Lemmon v.  
Webb.*

(z) Si arbor in vicini fundum radices porrexit, recidere eas vicino non licebit; agere autem licebit, non esse ejus, sicuti tignum, aut protectum, immissum habere. Si radicibus vicini arbor aletur, tamen ejus est, in cujus fundo origo ejus fuerit.—Dig. 47, 7, 6, § 2, arb. furt. cæs.

Si vicini arborem ita terrâ presserim, ut in meum fundum radices egerit, meam effici arborem. Rationem enim non permittere, ut alterius arbor intelli-

gatur, quam cujus fundo radices egresset. Et ideo prope confinium arbor posita, si etiam in vicinum fundum radices egerit, communis est.—Dig. 41, 1, 7, § 13, de adq. rer. dom.

Inst. 2, 1, 31, is identical in expression with the latter authority.

(a) Arts. 671—2—3, Code Civil; Pardessus, Traité des Servitudes, 297.

(b) [1894] 3 Ch. 1; on appeal, [1895] A. C. 1.

Overhanging  
trees a  
nuisance.

*Lemmon v.  
Webb.*

*Smith v.  
Giddy.*

[the owner of land which is overhung by trees growing on his neighbour's land is entitled without notice, if he does not trespass on his neighbour's land, to cut the branches so far as they overhang, even though they have done so for more than twenty years.

In *Smith v. Giddy* (c) the plaintiff and defendant were occupiers of adjoining land, and the plaintiff claimed damages in respect of the interference with the growth of his fruit trees, caused by certain trees growing on the defendant's premises overhanging the plaintiff's premises. It was held that an action lay for the damage thus sustained.]

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(c) [1904] 2 K. B. 448.

## PART IV.

## OF THE INCIDENTS OF EASEMENTS.

THE Incidents of Easements may be considered with reference to—

1st. The obligation [and right] to do the works necessary for the enjoyment of the easement, as to make repairs.

2nd. The secondary easements ancillary to, and depending upon, the primary easements.

3rd. The extent and mode of enjoyment.

## CHAPTER I.

## OBLIGATION [AND RIGHT] TO REPAIR.

As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything—the burden of repair falls upon the owner of the dominant tenement (a). Servient owner not bound to repair.

“Ad aquæ ductum,” says Bracton, “pertinet purgatio sicut ad viam pertinet refectio” (b).

“Where I grant a way over my land, I shall not be bound to repair it,” said Twisden, J., in *Pomfret v. Riccroft* (c).

“By the common law of England, he that hath the use of a thing ought to repair it,” said Lord Mansfield in *Taylor v. Whitehead* (d).

“The grantor of a way is not bound to repair it if it be foundrous” (e).

This is in accordance with the principles of the Civil Law, which imposed the burden of repair in cases of easement upon the owner of the dominant, and not upon the owner of the servient tenement (f).

(a) “If the grantee of a way wants it to be repaired he must repair it himself.” See per Coleridge, J., in *Duncan v. Louch* (1845), 6 Q. B. 909; 66 R. R. 592; and see the judgments in *R. H. Buckley & Sons, Ltd. v. N. Buckley & Sons*, [1898] 2 Q. B. 608; and *Jones v. Pritchard*, reported in Times Newspaper, Feb. 7th, 1908.

(b) Lib. 4, fol. 232, a.

(c) (1669), 1 Saund. 322, a; see also *Gerrard v. Cooke* (1806), 2 Bos. & Pull. N. R. 109.

(d) (1781), 2 Douglas, 749.

(e) Com. Dig. Chimin. (D. 6). [Cf. 1 Wms. Saund. 322 c; 1 Notes to Saund. 566; *Ingram v. Morecraft* (1863), 33 Beav. 49; *Robbins v. Jones* (1863), 15 C. B. N. S. 221; *Colebeck v. Girdlers' Co.* (1876), L. R. 1 Q. B. D. 234; *Highway Board of Macclesfield v. Grant* (1882), 51 L. J. Q. B. 357.]

(f) In omnibus servitutibus refectio ad eum pertinet, qui sibi servitutem adserit, non ad eum cujus res servit.—Dig. 8, 5, 6, § 2; *ibid.* 8, si serv. vind.

Servient  
owner not  
bound to  
repair.

When domi-  
nant owner  
liable for  
damage.

By the French Code Civil (*g*), the expenses incurred in constructing any works necessary for the use or preservation of any easement, must be borne by the party entitled to it.

What is above said is to be understood with reference only to the non-liability to repair on the part of the owner of the servient tenement.

It would appear on the principles hereafter considered, that, where the enjoyment of the easement is had by means of an artificial work (*opus manufactum*), the owner of the dominant tenement is liable for any damage arising from its want of repair. Thus, if a man carries water by means of conduit-pipes through his neighbour's land, he must keep those pipes in repair (*h*); [that is to say, if they fall out of repair and water consequently escapes on the neighbour's land, the owner of the dominant tenement cannot plead the easement as justifying what would otherwise be a trespass, because the easement is not, in fact, being properly exercised. But strictly speaking, the dominant owner cannot be said to be under any liability to repair (*i*). It would appear to be more accurate to say that, if the dominant owner cannot exercise the easement, strictly within its limits, without repairing the artificial work, he must do the necessary repairs if he wishes to exercise the easement.]

Where the easement is natural, and the injury to the servient tenement arises from natural causes only, no such liability accrues.

*Hoare v.*  
*Dickinson.*

The case of *Hoare v. Dickinson* (*j*), where an action was brought for the bad state of repair of some water-pipes, is not opposed to the principles above laid down, although from the point upon which the Court gave judgment, it cannot be treated as an authority in support of it. Nor indeed upon the facts as stated in the report could the point of liability to repair be raised; for the declaration did not state to whom the pipes belonged, nor that they ran through the plaintiff's land, but alleged merely that the defendant caused the water to run near the plaintiff's foundations, whereby they were rotted, so that, as the Court said, the defendant was plainly a wrongdoer, and upon this ground they gave judgment (*k*).

(*g*) Art. 698.

(*h*) [See *Bell v. Twentymen* (1841), 1 Q. B. 766; 55 R. R. 416; *Lord Egremont v. Fulman* (1829), M. & M. 404; and *Humphries v. Cousins* (1877), L. R. 2 C. P. D. 239; but cf. *Nathan v. Rouse*,

[1905] 1 K. B. 527.]

(*i*) *Jones v. Pritchard*, reported in Times Newspaper, Feb. 7th, 1908.

(*j*) (1730), 2 Lord Raymond, 1568.

(*k*) [See *Alston v. Grant* (1854), 3 El. & Bl. 128.]

A question appears to have been raised in some old cases, whether there was not by the law of England an exception to the rule already laid down—that the owner of the dominant tenement was bound to make the necessary reparations. Spurious easement to compel servient owner to repair.

In *Fitz. Nat. Brev.* (l), there is a writ commanding the mayor and sheriff of a town to summon one before them for not repairing his cellar, to the damage of him who has a cellar beneath it, which by the custom of the said town he was bound to repair. The other writ *de reparatione faciendâ* (m) is the case of a house becoming ruinous and dangerous to the neighbouring houses.

There is a case in *Keilwey* (n), as follows: "It seems to *Fineux* and *Brudnell* in the K. B., that where I have a chamber below (meason pavaile), and another has a chamber above mine (haute meason), as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below, by the reparation of the principal timber for the salvation of his chamber above.—Nota et stude. For some at the bar think that I may suffer my chamber to fall down (deschuer); but all were agreed that I could not abate my chamber to the destruction of the upper chamber (o), and the manner for me to compel another to sustain his chamber, ut suprâ, if the law be such, is by action on the case," &c.

So it is said by *Rainsford, J.*, in *Pomfret v. Ricroft* (p), "If a man demise by deed a middle room in a house, and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor."

The case in *Keilwey* was doubted by *Lord Holt*, in *Tenant v. Goldwin* (q), where he said, "he thought the writ in *Fitzherbert* must be founded upon the particular custom of places." *Serjeant Williams*, in his note to *Pomfret v. Ricroft* (r), observes, "It is difficult to say upon what other ground but custom such an action can be supported."

In *Edwards v. Halinder* (s), an action was brought by the *Edwards v. Halinder.*

(l) 121 F.

(m) 127 C.

(n) 98 b.

(o) Vide per *Parke, B.*, in *Harris v. Ryding* (1839), 5 M. & W. 71.

(p) (1669), 1 Saund. 322.

(q) (1705), 1 Salk. 360; S. C., 2 Lord Raymond, 1089.

(r) (1669), 1 Saund. 322, note; 1 Notes to Saund. 558.

(s) (1584), 2 Leon. 93; S. C., Popham, 46.



Spurious  
easement to  
compel ser-  
vient owner  
to repair.

*Edwards v.  
Halinder.*

tenant of a cellar against the tenant of the room above, both holding under the same landlord, for overloading his floor, whereby it fell through and destroyed the plaintiff's wine in the cellar beneath.

The defendant pleaded, "That, before the charging of the floor, ut suprà, the said floor had sustained greater weight, and, further, that the landlord let the said shop to him, to lay there the weight of thirty tons, and he had laid there but the weight of twelve tons; and also that the walls of the said cellar were so weak that the floor of the said shop fell by reason thereof." Upon which there was a demurrer in law, and judgment was given for the plaintiff, which was affirmed on a writ of error in the Exchequer Chamber, as it would appear, upon the ground that there being no traverse of the fact charged in the declaration—the overloading—the plea was impertinent. Nothing whatever was decided as to the liability to repair.

Gent, B., was of opinion, "That the defendant had not fully answered the declaration, for he was charged with the laying too much weight on the floor there, so as vi ponderis it fell down; to which the defendant has said that the walls were ruinous in occultis partibus, and doth not answer to the surcharging (scil.) absque hoc, that he did surcharge."

Clarke, B., agreed with Gent, B., as it appears, in opposition to Manwood, C. B., who thought no traverse was necessary.

The report in Popham gives the argument in the Exchequer Chamber; from which it appears that the judgment was affirmed on the same ground that it was given below.

In an anonymous case (t), it is said, "If a man has an upper room, an action lies against him by one who has an under room, to compel him to repair his roof. And so where a man has a ground room, they over him may have an action to compel him to keep up and maintain his foundation. Sed quære. For if a man build a new house under the roof of an old one which is ready to tumble, whether he shall have a writ de reparatione faciendâ, because debet et consuevit are necessary words in the declaration."

Holt, C. J., said, "That every man of common right ought so to support his own house as that it may not be an annoyance to another man's" (u).

(t) (1796), 11 Mod. 7.

(u) [See this dictum referred to per

The report of the case in *Keilwey* in reality amounts to no more than a statement that such a point had been agitated. The dictum of Rainsford, J., in *Pomfret v. Ricraft*, was probably founded, according to Serjeant Williams, upon this report; there seems also some doubt whether it did not proceed on the ground of a covenant implied in the demise. The writ in *Fitzherbert* is obviously founded on a local custom only; and the case in *Leonard* went off entirely on a point of pleading. There appears, therefore, to be no authority whatever to oppose to the opinion of Lord Holt, that such an obligation could only exist when specially imposed (x), [except in cases between landlord and tenant.

Spurious  
easement to  
compel ser-  
vient owner  
to repair.

Result of  
authorities.

Cur. in *Alston v. Grant* (1854), 3 E. & B. 128. But he is not bound to repair it, but only to prevent his neighbour from being injured by its fall. *Chauntler v. Robinson* (1849), 4 Exch. 163, per Cur. Note the distinction between such cases and those in which, although there be no duty to repair, yet the defendant is held liable for injury caused by a use of some part of his premises, ex. gr., a drain, which, by reason of its improper construction, causes damage to the neighbour's house, as in *Alston v. Grant*, ubi sup.]

(x) [See Serjt. Williams' note, 1 Wms. Saund. 321; 1 Notes to Saund. 558; *Colebeck v. Girdlers' Company* (1876), L. R. 1 Q. B. D. 234.]

The following cases are given in the American edition of this book, by "E. Hammond, Counsellor at Law," New York, 1840. In *Loring v. Bacon*, 4 Mass. Rep. 575, the question arose whether the owner of the lower part of the house was obliged to contribute to the repairs of the upper part. Parsons, C. J., in delivering the judgment of the court, says:—"The plaintiff declares in case upon several promises. The first count is indebitatus assumpsit in the sum of eighty dollars, according to the account annexed to the writ, the items of which are for timber, boards, shingles, nails and labour, and victualling the workmen. The second count is a quantum meruit for the same items, technically supposed to be different but similar. The third count is a general indebitatus assumpsit for eighty dollars, laid out and expended.

"The facts being agreed by the parties, the question of law comes before the court on the case stated. From this case, it appears, that the defendant is seised in fee simple of a room on the lower

floor of a dwelling-house, and of the cellar under it; and that the plaintiff is seised in fee of a chamber over it, and of the remainder of the house; that the roof of the house was so out of repair, that unless repaired no part of the house could be comfortably occupied; that the defendant, though seasonably requested by the plaintiff, refused to join with him in repairing it; and the plaintiff then made the necessary repairs, and has brought this action to recover damages for her refusal to join in the repairs. It is also agreed that the parties had from time to time repaired the respective parts of the house at their several expenses. And the question submitted to the court is, whether the plaintiff can recover in this action.

"This is an action of the first impression. No express promise is admitted; but, if there is a legal obligation on the defendant to contribute to these repairs, the law will imply a promise.

"We have no statute, nor any usage upon this subject, and must apply to the common law to guide us.

"Although, in the case, the parties consider themselves as severally seised of different parts of one dwelling-house, yet, in legal contemplation, each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof and other parts of the edifice are the plaintiff's dwelling-house. And in this action it appears that, having repaired his own house, he calls upon her to contribute to the expenses, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage if he had not repaired.

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compel ser-  
vient owner  
to repair.

*Miller v.  
Hancock.*

[In *Miller v. Hancock* (y), a case in which the relationship of landlord and tenant existed, it was held that the liability to repair

"Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff.

"Houses for the habitation, and mills for the support of man, are of high consideration at common law; and, when holden in common or joint tenancy, remedies are provided against those tenants, who refuse to join in necessary reparation, by the writ de reparatione faciendâ; Co. Litt. 200 b; Fitz. N. B. 295. In Co. Litt. 56 b, it is said, that if a man has a house so near to the house of his neighbour and he suffers it to be so ruinous that it is likely to fall on his neighbour's house, he may have a writ de domo reparandâ, and compel him to repair his house. In *Keilwey*, 98 b, pl. 4, there is a case reported, in the time of Henry the Eighth, in which *Fineux* and *Brudnell*, justices of the King's Bench, were of opinion, that if a man have a house underneath, and another have a house over it, as in the case in London, the owner of the first house may compel the other to cover the house, to preserve the timbers of the house underneath, and so may the owner of the house above compel the other to repair the timbers of his house below; and this by action of the case. But some of the bar were of opinion, that the owner of the house underneath might suffer it to fall; yet all agreed that he could not pull it down to destroy the house above. And in *Fitz. N. B.* 296, there is a writ of this kind. But in the case of *Tenant v. Goldwin* (1794), 6 Mod. 314, Lord Holt was of opinion that this writ was by virtue of a particular custom, and not of the common law; and he doubted the case in *Keilwey*.

"But there is unquestionably a writ at common law, de domo reparandâ, the form of which we have in *Fitz. N. B.* 295, in which A. is commanded to repair a certain house of his in N. which is in danger of falling to the nuisance of the freehold of B. in the same town, and which A. ought, and hath been used, to repair, &c. This writ, *Fitzherbert* says, lies when a man, who has a house adjoining to the house of his neighbour, suffers his house to lie in decay to the annoyance of his neighbour's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until he do it. But it is

otherwise in an action of the case; for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoin to another on one side, or above, or underneath it.

"But if the case in *Keilwey* is law, the plaintiff cannot recover, for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her in damages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

"If the case in *Keilwey* is not law, then, upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expenses in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house.

"In every view of this case, there is no legal ground on which the plaintiff's action can be supported. We do not now decide on the authority due to the case in *Keilwey*; but if an action on the case should come before us founded on that report, it will deserve a further and full consideration. The plaintiff must be called."

In *Cheeseborough v. Green*, 10 Conn. 318, which was an action on the case brought by the owner of the lower part of a store against the owner of the upper part and roof of the building to recover damages for suffering the roof to be out of repair, the Court held, that the action could not be sustained; in a Court of Chancery only can the plaintiff have adequate remedy. *Daggett, C. J.*: "The declaration, in substance, is that the plaintiff owns the first and second stories of a brick store, and the defendant owns the third storey and roof. The defendant has suffered the roof to decay and become leaky and ruinous, so that the lower part of the building is injured, and for this neglect of the defendant this action is brought. The Superior Court, on a trial, found the facts alleged true, but adjudged the declaration insufficient. It is now to be decided by this Court, whether this action can be sustained. There is no statute, nor any custom, nor any ad-

(y) [1893] 2 Q. B. 177.

[existed although not specially imposed. The defendant was the owner of a building the different floors of which were let by him separately. The staircase, by means of which access to the separate sets of rooms was obtained, remained in the possession and control of the defendant, and the tenancy agreements contained no reference to the staircase. The plaintiff, who had in the course of business called on the tenant of one of the floors, fell, through the defective condition of the stairs, and sustained injuries. In an action brought by the plaintiff in respect of the injuries so sustained it was held that there was, by necessary implication, an agreement by the defendant with his tenants to keep the staircase in repair, and, as the defendant must have known and contem-

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judged case in Connecticut on the subject. The plaintiff relies upon the principles of the common law to uphold this action. He founds himself principally on a case, *Keilwey*, 98 b, pl. 4, where the doctrine was laid down by two judges of the Court of King's Bench. In *Tenant v. Goldwin* (1794), 6 Mod. 314; S. C., 1 Salk. 360, Lord Holt disapproved of the case in *Keilwey*, and said, that it was supported by the custom of particular places, and not by the common law. There was a writ de reparatione faciendâ against those of several joint tenants, or tenants in common, who refused to join in necessary repairs. So if the house of A. be near that of B., and the former becomes so ruinous that it endangers the latter, B. may have a writ de domo reparandâ, and compel A. to repair his house. I am not aware that any such writ has been known in the practice of our courts. Perhaps an action on the case would lie against any one who should negligently suffer his building to decay, and fall on and injure the property of another, on the maxim *Sic utere tuo ut alienum non lædas*. That, however, is not this case.

"Nor can we say, in the absence of statute regulation, or express decision, that this doctrine is so reasonable that an action can be sustained. In large cities, houses generally consist of four or five stories. The owner of the fifth story, upon the principle assumed by the plaintiff, is compellable to furnish a sufficient roof to protect the whole building against water. Also, the owner of each story is obliged to secure the side and ends, as the case may be, against the entrance of water to the annoyance of all those who own or occupy below.

The owner of the lower story is compellable, also, to keep the foundation suitably repaired, to sustain each of the other stories, with their additional (as the case may be) superincumbent weight.

"These considerations, and others easily suggested, would lead to the conclusion, that a remedy in such case can be furnished only by a Court of Chancery. The principles adopted by Chancellor Kent in *Campbell v. Mesier & al.*, 4 Johns. Ch. Rep. 334, countenance this idea. The case of *Loring v. Bacon*, 4 Mass. Rep. 575, was pressed by the counsel for the plaintiff. There, it was decided, that the owner of the upper story could not recover in assumpsit against the owner of the floor and cellar, for necessary repairs to the roof. Chief Justice Parsons speaks of the case in *Keilwey*, without deciding on its authority. He does not decide the plaintiff to be without remedy; he says truly, he has no legal ground for recovery. It will be borne in mind, that there was then [1806] no Court of Chancery in Massachusetts."

[In *Graves v. Burdan* (26 N. Y. 501), Judge Rosekrans says:—"The rule seems to be settled in England, that when a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground-floor is bound by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story." (See Washburn on Easements, 564 to 573.)]

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[plated that it would be used by persons having business with such tenants, there was also a duty on the defendant towards such persons to keep it in a reasonably safe condition and the action was therefore maintainable.

In the judgments delivered by the Court of Appeal (2), the ordinary rule that the person in the enjoyment of an easement is bound to do the necessary repairs appears to have been recognized, and the judgment proceeded upon the reasoning that, in the circumstances of that case, the grantor of the easement had by necessary implication undertaken the obligation of repairing, Lord Esher, M. R., in effect, basing his decision upon the ground that the landlord would be derogating from his grant in not keeping the staircase in such a condition as to allow the tenants to obtain access to their premises.

*Hargroves, Aronson & Co. v. Hartopp.*

In *Hargroves, Aronson & Co. v. Hartopp* (a) it was held that the defendants, who were landlords to the plaintiffs of a floor in a building, were bound to keep a rainwater gutter in the roof, which was under their control, in such a condition as not to cause damage to the plaintiffs. The plaintiffs had given notice to the defendants that the gutter had become stopped up, but the defendants neglected to have the stoppage cleared away, and the plaintiffs were held entitled to recover in respect of damage thereby caused to them.]

Civil law.

The Civil Law recognizes the existence of such an easement as this (*oneris ferendi*), as distinguished from the ordinary easement of support (*tigni immittendi*); but it appears, that the additional obligation of repair could only be imposed by an express stipulation to that effect in the instrument creating the easement (b), or

(2) Lord Esher, M. R., and Bowen and Kay, L. J.

(a) [1905] 1 K. B 472.

(b) *Modus autem refectionis in hac actione ad eum modum pertinet, qui in servitute imposita continetur: forte, ut reficiat lapide quadrato, vel lapide structili, vel quovis alio opere, quod in servitute dictum est.*—Dig. 8, 5, 6, § 5, si serv. vind.

“Il ne faut pas croire, avec le plus grand nombre des interprètes au droit, que la servitude *oneris ferendi* ait été une exception à cette règle. Il était bien d'usage de stipuler dans cette servitude, que le voisin serait obligé de reconstruire et d'entretenir le mur, ou le pilier qui soutenait quelque partie du bâtiment

voisin; mais c'était là l'effet, non pas du droit de servitude en lui-même, mais d'une stipulation particulière, ajoutée au droit de servitude. Encore Aquilius Gallus, l'un des plus célèbres jurisconsultes Romains, prétendait-il que cette obligation était contraire à la nature des servitudes. Les autres jurisconsultes se contentaient de dire que le voisin pouvait se libérer de cette obligation en abandonnant le fonds sur lequel le mur, ou la colonne, qui portait l'édifice voisin, était situé; et dans tout cas, le propriétaire du fonds dominant n'en pouvait pas demander le rétablissement par l'action réelle *confessoria servitutis*, mais seulement en vertu de l'équité, *implicatione officii iudicis*.”—Merlin, Répertoire de Jurisprudence, tit. Servitude, p. 44.

at all events there must have been a prescriptive right to the repair, as well as to the support. Indeed it has been doubted whether such an easement could exist at all, unless the precise technical expression "*paries oneri ferendo*" was inserted in the original grant (c).

Spurious easement to compel servient owner to repair.

Civil law.

The servitude of the Civil Law, called "*paries oneri ferendo*," imposed upon the owner of the servient tenement the obligation not only of supporting the dominant edifice, but also of keeping his own buildings in such a state of repair as should enable them to sustain the pressure. The validity of this servitude, though admitted to be of an anomalous character, appears to have been fully established, notwithstanding some difference of opinion upon this subject (d): but still it was said that the obligation was not upon the person, but upon the tenement, and that by relinquishing the tenement, the owner's liability to repair was determined (e).

This obligation to repair was, however, strictly construed, and did not carry with it as an incident any obligation to furnish support to the dominant tenement during any necessary reparation of the servient tenement. In this respect the owner of the dominant tenement was bound to take care of himself, by shoring or other means, or, if he neglected so to do, he might

(c) Stair's Inst. 328; Erskine, Inst. 431.

(d) *Eum debere columnam restituere, quæ onus vicinarum ædium ferebat, cujus essent ædes, quæ servirent: non eum, qui imponere vellet: nam cum in lege ædium ita scriptum est—paries oneri ferendo, uti nunc est, ita sit—satis apertè significari, in perpetuum parietem esse debere; non enim hoc his verbis dici, "ut in perpetuum idem paries æternus esset," quod ne fieri quidem posset, sed "uti ejusdem modi paries in perpetuum esset qui onus sustineret; "quemadmodum, si quis alieni cavisset, ut servitutem præberet, qui onus suum sustineret, si ea res, quæ servit, et tuum onus ferret, perisset, alia in locum ejus dari debeat.—Dig. 8, 2, 33, de serv. præd. urb.*

In servitute oneris ferendi hoc amplius est, quod vicinus columnam aut parietem qui oneri ferendo est reficere tenetur, et idoneum onere sustinendo præstare, quâ parte servitus hæc degenerat et spuria esse agnoscitur—quippe cum contrâ naturam servitutum hoc sit ut quis cogatur aliquid facere in

suo.—Vinnius, Inst. Lib. 2, tit. 3, de serv. urb. § 3.

Etiam de servitute, quæ oneris ferendi causâ imposita erit, actio nobis competit, ut et onera ferat, et ædificia reficiat ad eum modum, qui servitute imposita comprehensus est. Et Gallus putat, non posse ita servitutem imponi, "ut quis facere aliquid cogeretur," sed "ne me facere prohiberet;" nam in omnibus servitutibus refectio ad eum pertinet qui sibi servitutem adserit; non ad eum, cujus res servit. Sed evaluit Servii sententia in propositâ specie, ut possit quis defendere, jus sibi esse, cogere adversarium reficere parietem ad onera sua sustinenda.—Dig. 8, 5, 6, § 2, si serv. vind.

(e) *Labeo autem hanc servitutem non hominem debere, sed rem; denique licere domino rem derelinquere, scribit. Ibidem.*

Hæc autem actio in rem magis est, quam in personam: et non alii competit, quam domino ædium, adversus dominum; sicuti cæterarum servitutum intentio.—Ibid. § 3.

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Civil law.

"take down his house (*f*) and rebuild it when the wall was restored" (*g*).

The analogous servitude "*tigni immittendi*," clearly imposed no obligation on the owner of the servient tenement to keep his walls in repair; the right conferred was "to insert a beam into the neighbour's wall, so that it might remain there, and the neighbour's wall might sustain the weight," but nothing beyond this (*h*).

Code Civil.

By the French Civil Code, when the different stories of a house belong to different proprietors, their respective rights and liabilities are fixed with great minuteness—supposing the instruments creating their respective titles to contain no provision for repair. The main walls (*gros murs*) and roof are kept in repair at the expense of all the proprietors, each contributing according to the value of the portion which belongs to him: the proprietor of each story is bound to keep in repair his own floor; the proprietor of the first story is bound to keep in repair the staircase leading up to it; the proprietor of the second is bound to keep in repair that part of the staircase which leads from the first story to him; and so with regard to the other proprietors (*i*).

Scotch law.

The Scotch law, which to a great extent is based upon the civil law, is in accordance with the doctrine, "that to impose such an obligation to repair on the owner of the servient tenement, there must be either an express stipulation to that effect, or actual proof that there is a prescriptive right to the repair as well as to the support."

Lord Stair.

"The precise positive servitude of city tenements," says Lord

(*f*) "*Ironicum consilium*," says Pothier.

(*g*) Sicut autem refectio parietis ad vicinum pertinet, ita futura ædificiorum vicini, cui servitus debetur, quamdiu paries reficietur, ad inferiorem vicinum non debet pertinere; nam, si non vult superior fulcire, deponat: et restituet cum paries fuerit restitutus. Et hic quoque sicut in cæteris servitutibus, actio contraria dabitur: hoc est, *jus tibi non esse me cogere*.—Dig. 8, 5, 8, si serv. vind.

(*h*) In imponendâ servitute tigni immittendi hoc agitur, ut ex nostro pariete liceat tignum trabem immittere in parietem vicini ita ut ibi requiescat, et vicini paries sustineat onus immissi—nihil amplius.—Vinnius, Inst. Lib. 2, tit. de serv. urb. 3.

Competit mihi actio adversus eum, qui cecidit mihi [talem] servitutem, ut in parietem ejus tigna immittere mihi liceat, supraque ea tigna (verbi gratiâ) porticum ambulatoriam facere, superque eum parietem columnas structiles imponere, quæ tectum porticulis ambulatoriæ sustineant.—Dig. 8, 5, 8, § 1, si serv. vind.

Distant autem hæ actiones (i.e., oneris ferendi et tigni immittendi) inter se: quod superior quidem locum habet etiam ad compellendum vicinum reficere parietem [meum]; hæc vero locum habet ad hoc solum, ut tigna suscipiat: quod non est contra genera servitutum. Ibid. § 2.

(*i*) Art. 664; Pardessus, *Traité des Servitudes*, 288.

Stair, "is the servitude of support, whereby the servient tenement is liable to bear any burden for the use of the dominant, and that, either by laying on the weight upon its walls or other parts thereof, or by putting in joists, or other means of support, in the walls of the same, which the Romans called *servitutem tigni immittendi*; or otherwise, this servitude may be by bearing the pressure, or putt, of any building, for the use of the dominant tenement, as of a vault, or pend, or the like; such is the servitude of superstructure whereby any building may be built upon the servient tenement. Like unto which is now frequent in Edinburgh, when one tenement is built above another at diverse times, or diverse stories or contignations of the same tenement are bought by diverse proprietors, and thereby the upper becomes a distinct tenement, and hath a servitude upon the lower tenements, whereby they must support it. The question useth to be moved here, whether the owner of the servient tenement be obliged to uphold or repair his tenement, that it may be sufficient to support the burden of the dominant tenement?

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Lord Stair.

"There are opinions of the learned, and probable reasons upon both facts: for the affirmation maketh the common rule that, when anything is granted, all things are understood to be granted therewith that are necessary thereto; so he who constituteth upon his tenement a servitude of support, must make it effectual; and for that negative servitudes are odious, and not to be extended beyond what is expressly granted or accustomed, to which we incline; and, therefore, it would be adverted how the servitude is constituted, that if it appear the constituent had granted this servitude so as to uphold it, not upon the account of his own tenement, but of the dominant, he must so continue; and it is not only a personal obligation, but a part of the servitude passing with the servient tenement, even to singular successors: but if it appear not so constituted, it will impart no more than a tolerance to lay on or impute the burden of the dominant tenement upon the servient, which, therefore, the owner of the servient neither can hinder or prejudice; but he is not obliged to do any positive deed by reparation of his own tenement to that purpose; but the owner of the dominant tenement hath right to repair it for his own use, by reason of his servitude, and the owner of the servient tenement cannot hinder him; yea, in what he thereby advantages the servient tenement, he hath upon the owner thereby the natural obligation of recompence in quantum lucratus.



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to repair.

Lord Stair.

"If it be objected that, within burgh, the owners of the inferior and supporting tenements are obliged to repair for the behoof of the superior tenements, the owners whereof may legally enforce reparation; yet it inferreth not this to be the nature of a servitude, but a positive statute or custom of the burgh for the public good thereof, which is concerned in upholding tenements. But mainly the reason of it is, because when diverse owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof remaineth roof to both, and the ground supporteth both; and therefore, by the nature of communion, there are mutual obligations upon both, viz., that the owner of the lower tenement must uphold his tenement as a foundation to the upper, and the owner of the upper tenement must uphold his tenement as a roof and cover to the lower, both which, though they have the resemblance of servitudes, and pass with the thing to singular successors, yet they are rather personal obligations, such as pass in communion even to the singular successors of either party" (k).

Liability of  
servient  
owner to re-  
pair by pre-  
scription or  
tenure.

A somewhat similar question arises in the case of a public highway or bridge, where a particular person is held liable to repair *ratione tenuræ* (l), or by prescription, contrary to the common law, by which the obligation is imposed upon the parish or county (m).

"Et sicut poterit quis facere nocumentum injuriosum in faciendo, ita poterit in non faciendo, in proprio vel in alieno, ut si ex constitutione obstruere et claudere, purgare et reficere, et non fecerit, cum ad hoc teneatur" (n).

If a man, who is bound by tenure to repair a certain causeway by prescription, does not repair it, per quod my land is surrounded, I may have an action on the case against him (o).

(k) Stair's Institutes, Book 2, tit. 7, s. 6.

(l) 2 Inst. 700; Com. Dig. Chimin, A. 4. [*Reg. v. Duchess of Buccleugh* (3 Anne), 6 Mod. 150; *Reg. v. Bucknell* (1 Anne), 7 Mod. 55; *Reg. v. Manners Sutton* (1835), 3 A. & E. 597; 42 R. R. 490; *Baker v. Greenhill* (1842), 3 Q. B. 148; 61 R. R. 173; *Reg. v. Barker* (1890), L. R. 25 Q. B. D. 213; *Heath v. Overseers of Weaverham*, [1894] 2 Q. B. 108; *Cuckfield Rural District Council v. Goring*, [1898] 1 Q. B. 865; *Rundle v. Harle*, [1898] 2 Q. B. 83; *Darenty District Council v. Parker*, [1900] 1 Q. B. 1. As to exemption from highway rates for a person bound to repair a highway *ratione*

*tenuræ*, see *North Eastern Railway v. Dalton Overseers*, [1898] 2 Q. B. 66; [1899] 1 Q. B. 1026; on appeal, sub nom. *Dalton Overseers v. North Eastern Railway*, [1900] A. C. 345; *Ferrand v. Bingley Urban Council*, [1903] 2 K. B. 445. As to liability *ratione clausuræ*, see *Reg. v. Ramaden* (1858), E. B. & E. 949.]

(m) *Regina v. Inhabitants of the County of Wilts* (1705), Salkeld, 359.

(n) Bracton, Lib. 4, f. 232 b; Com. Dig. tit. Chimin, D. 6.

(o) 29 Edw. 3, 32 b; and see 1 Wms. Saunders, 322; 1 Notes to Saund. 565. [Cf. *Mayor of Lyme Regis v. Henley* (1834), 1 Bing. N. C. 222; 37 R. R. 125; *Nitro-Phosphate and Odam's Chemi-*

As, however, the obligation thus imposed on the servient tenement is contrary to the usual incidents of easements, it will, of course, require greater strictness of proof (*p*).

Liability of  
servient  
owner to  
repair by pre-  
scription or  
tenure.

Although, as it would appear by the civil law, with the single exception of the *servitus oneris ferendi*, no easement could exist which imposed on the owner of the servient tenement an obligation to repair, and any stipulation to that effect was personal, binding on the contracting parties only, and not imposing any charge upon the inheritance, so as to pass with it into the hands of a new owner; yet there is little doubt that, by the law of England, such an obligation may be imposed either by express grant or prescription (*q*).

Any stipulation by deed, affecting the quality or mode of enjoyment of land—as, for instance, a covenant to repair a house upon it (*r*)—runs with the land, and this doctrine applies to implied as well as express covenants; and as a prescriptive right to an easement is equivalent to an express stipulation by deed, which the law allows to be made in favour of the successive owners of the neighbouring tenement, it seems that the same consequences must follow from it (*s*).

If a man make a bridge for the common good of all the subjects, he is not bound to repair it, for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ*, or *prescriptionis*. As to the second, the remedy was if it were a private bridge, as to a mill, which A. was bound to maintain, over which B. had a passage, &c., if the bridge were in decay B. might have his writ *de ponte reparando* (*t*).

“By the common law,” says Lord Mansfield, “he that hath the

*cal Manure Co. v. London and St. Catherine's Docks Co.* (1873), L. R. 9 Ch. Div. 503.]

(*p*) [*Highway Board of Macclesfield v. Grant* (1882), 51 L. J. N. S. Q. B. 357; *Rundle v. Hearle*, [1898] 2 Q. B. 83; *Esher and Dittons Urban Council v. Marks* (1902), 71 L. J. K. B. 309; 86 L. T. 222. See, as to what evidence is required to establish a prescriptive liability to repair a sea-wall, *Hudson v. Tabor* (1877), L. R. 2 Q. B. Div. 290; *Commissioners of Sewers for Fobbing v. The Queen* (1886), L. R. 11 App. Cas. 449.]

(*q*) [See Com. Dig. tit. Abatement, H. 13, as to liability to repair river banks. It is to be observed, that Lord Tenterden's Act does not affect “mere duties,” and that a liability to repair could not be established under it, though a right to repair, as accessory to the enjoyment

of some easement, may.]

(*r*) 2 Inst. 701.

(*s*) [The authorities appear to show that the burden of an affirmative covenant does not run with land either at law or in equity, and that at law the burden even of a negative covenant does not run with land, so as to bind an assignee, except as between landlord and tenant (*ante*, p. 80); and the case of a liability to repair is no exception, as such liability is in the nature of an easement (see per Bayley, J., 6 B. & C. 339), even if it originated in an express covenant.]

(*t*) *Sampson v. Easterby* (1829), 9 B. & Cr. 505; 4 Man. & Ry. 422; 33 R. R. 239; S. C. in error, *Easterby v. Sampson*, 1 Cr. & J. 105; 4 Moo. & P. 601; 33 R. R. 239.

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tenure.

use of a thing ought to repair it;" but "the grantor may bind himself" (u).

However, says Mr. Serjeant Williams in the note to *Pomfret v. Ricroft*, "the grantor of a right of way may be bound either by express stipulation or prescription to repair it" (x): and he cites the case of *Rider v. Smith* (y), in which an action was brought against the owner of a close for not keeping in repair a footway running across it, and the Court held, that a declaration, alleging that, "by reason of his possession," the defendant ought to repair, was good on demurrer, and that the special matter of the obligation might be given in evidence thus recognizing, at all events, the possibility of such an obligation being established.

Right of  
dominant  
owner to  
repair.

As the burden of repair is by law imposed upon the owner of the dominant tenement, a corresponding right is also conferred upon him—to do all those acts which may be necessary to secure the full enjoyment of the easement, even though he should thereby be compelled to commit a trespass (z). This right to do all such acts as are essential to the enjoyment of the easement granted, was recognized in a very early case (a).

9 Edw. 4.

Choke, J.—"If a man grant me (a right) to dig in his land and to make a trench from a certain fountain or spring to my place, so that I may lay down a pipe to convey the water to my place, if afterwards the pipe is stopped or broken so that the water run out of it, I cannot dig in his land to amend the pipe—for this was not granted to me—but if he grant that I may dig, &c., to amend the pipe, totiens quotiens, &c., then I shall dig. And, in like manner, if I prescribe to have such a conduit, I must also prescribe to scour and amend it, totiens quotiens, &c., or otherwise I cannot dig in his land to amend, &c. But this was denied in both cases, for it was said by the Court, that it is incident to such a grant to scour and amend" (b).

*Pomfret v.  
Ricroft.*

Thus, in the case of *Pomfret v. Ricroft* (c), already cited, it was held, that where a party had an easement to use a pump in his neighbour's land, "although neither the soil nor the pump itself

(u) *Taylor v. Whitehead* (1781), 2 Doug. 745. Cf. *Miller v. Hancock*, [1893] 2 Q. B. 177.

(x) 1 Wms. Saund. 322 c; 1 Notes to Saund. 566.

(y) (1790), 3 T. R. 766.

(z) But in the case of a highway there is no right to repair where there is no obligation to repair; and therefore

where the obligation to repair is in a local authority, its default does not give a right to any other persons to do the necessary repairs. *Campbell Darys v. Lloyd*, [1901] 2 Ch. 518.

(a) 9 Edw. 4, 35.

(b) [Cf. *Nicholas v. Chamberlain*, above, p. 118; and see, as to the second case, *Peter v. Daniel* (1848), 5 C. B. 568.]

(c) (1669), 1 Saund. 321.

was granted to him, yet by the grant of the use of the pump the law had given him the liberty (to enter upon the land and repair the pump) ; for, when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As, if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me" (d). In this case the action (which was in covenant) was brought by the grantee of the easement for a breach of the implied covenant to repair on the part of the grantor. The Court of K. B. gave judgment for the plaintiff, which was afterwards reversed in the Exchequer Chamber upon the grounds above given.

Right of  
dominant  
owner to  
repair.

*Pomfret v.  
Ricroft.*

[In *R. H. Buckley & Sons, Ltd. v. N. Buckley & Sons (e)*, it was sought to extend the principle laid down by *Pomfret v. Ricroft* so as to free the party under liability to repair from the consequences of a breach of such liability on the ground that the party injured by such breach had himself the right, under the doctrine of *Pomfret v. Ricroft*, to execute the necessary repairs. In that case the owner of land on the bank of a river, for the purpose of bringing water from the river to a mill which he had erected (called Carr Hill Mill), made a watercourse with a shuttle at the head of it to control the flow of water from the river into the watercourse. He afterwards conveyed away part of his adjoining land through which the watercourse ran, reserving the right to enter upon the land for the purpose of repairing the watercourse. The owners of this land, predecessors in title of the plaintiffs, subsequently erected upon it a mill (called Wood End Mill), and a successor in title of the person who had made the watercourse, who then owned it and Carr Hill Mill, granted to the then owner of Wood End Mill by deed, in 1874, certain rights in respect of the watercourse, the water in which had for some years previously been used by the owner of Wood End Mill for the purposes of his mill, and at the same time both parties mutually covenanted not to do anything whereby the free running of water through the watercourse might be obstructed. The shuttle at the head of the watercourse having been allowed to get out of repair, flood waters rushing into the watercourse overflowed its bank where it passed through the plaintiffs' land, and did the damage complained of to goods stored thereon.

*Buckley, Ltd.  
v. Buckley.*

(d) This is cited as clear law by Lord Coke in *Liford's Case* (1738), 11 Rep. 42 a.  
(e) [1898] 2 Q. B. 608.

Right of  
dominant  
owner to  
repair.

[It was held that, notwithstanding the plaintiffs had a right to repair the shuttle themselves, by reason of the right to use the water acquired by them either by the grant of 1874 or by prescription, the defendants, as owners of the watercourse and shuttle, were bound to repair the shuttle, so as to prevent it getting into a dangerous state, and were therefore liable to the plaintiffs.

The following passage occurs in the judgment of Vaughan Williams, L. J.: "It is suggested, however, that, the plaintiffs having acquired a right to the flow of water in the goit, the doctrine of *Pomfret v. Ricroft* applies, and the before-mentioned obligation of the owners of the defendants' land towards the owners of the plaintiffs' land has therefore ceased. It may be taken that the decision in that case establishes that the owner of the servient tenement is under no obligation to the owner of the dominant tenement to execute such repairs as may be necessary for the enjoyment of the easement, and that the owner of the dominant tenement cannot sue the owner of the servient tenement for not doing such repairs. But I do not see how that doctrine in any way gets rid of the obligation, which was imposed on the owners of the land on which this artificial watercourse had been constructed long before the plaintiffs' right to use the water came into existence, to keep the goit in repair so that the water should not break out and injure the lands of adjoining proprietors, including those of the plaintiffs. I do not think that the plaintiffs' predecessor in title, by taking the right given him by the deed of 1874, and the consequential right of executing such repairs as might be necessary to enable him to get the benefit of that right, did away with the obligation imposed on the owner of the defendants' land to keep the shuttle in repair."

In *Hoare v. Metropolitan Board of Works* (f), a publican whose sign-post had stood for forty years upon a common adjoining his public-house, was held entitled to replace it when it was blown down.

In *Goodhart v. Hyett* (g), the plaintiff, being entitled to a supply of water through some pipes laid in the defendant's land, obtained an injunction restraining the defendant from building over the pipes, on the ground that the building would interfere with the plaintiff's access to the pipes for purposes of repair.]

Right to de-  
viate, if way  
foundrous.

As, then, at common law the obligation to repair falls on the owner of the dominant tenement—and it must be his own fault if the way be impassable—he can have no right to leave the ordinary

(f) (1874), L. R. 9 Q. B. 296.

(g) (1883), L. R. 25 Ch. D. 182.

track on account of its want of repair, for which the owner of the land is not answerable (*h*); though it may be otherwise in the case of public highways (*i*).

Right to deviate, if way foundrous.

There is no authority expressly deciding this point, where the obligation is imposed by prescription, or otherwise, on the servient tenement.

It is thus stated in Comyns' Digest (*k*)—

"If a man be bound by prescription to the repair of a way, he need not keep it in better repair than it always was. But if it be impassable, a passenger may break the fence, and go *extra viam* as much as is necessary to avoid the bad way." Private way.

Upon reference, however, to the original authority (*l*), it clearly appears that the grantor of the way was bound to keep it in repair.

The misapprehension of the authority cited in Comyns' Digest (*m*) appears to have originated in the mistake of Blackstone, who lays it down, that in public, as well as in private ways, a man who had the right of way might, if it were out of repair, go over the adjoining land (*n*).

The cases cited by Blackstone in support of this position, appear to be those of public ways only.

This distinction is also recognized by the civil law: if the public highway was impassable, a traveller might pass along the land adjoining; but no such right appears to have existed in respect of private ways (*o*).

There is, of course, a right to deviate if the grantor obstructs the way, and this right is binding upon, and will be enforced by injunction against, a purchaser from the grantor with notice (*p*).

(*h*) *Taylor v. Whitehead* (1781), 2 Doug. 745; *Bullard v. Harrison* (1815), 4 M. & Sel. 387, overruling 2 Blackstone's Com. 36; 16 R. R. 493, Preface VI.; [1 Wms. Saund. 322 c; 1 Notes to Saund. 565].

(*i*) [But see *Arnold v. Holbrook* (1873), L. R. 8 Q. B. 96.]

(*k*) [Com. Dig. Chimin, D. 6.]

(*l*) Cited in *Henn's Case* (1633), Sir W. Jones, 296. [So that his failure to repair would be like an actual obstruction by him; *Robertson v. Gantlett* (1847), 16 M. & W. 289; *Selby v. Nettlefold* (1873), L. R. 9 Ch. 111.]

(*m*) See *Bullard v. Harrison* (1815), 4 M. & Sel. 390; 16 R. R. 493, Preface VI.

(*n*) 2 Comm. 36.

(*o*) Cum via publica vel fluminis impetu vel ruinâ amissa est, vicinus proximus viam præstare debet.—Dig. 8, 6, 14, § 1, quemad. serv. amit.

Si locus, per quem via, aut iter, aut actus debebatur, impetu fluminis occupatus esset, et intra tempus, quod ad amittendam servitutem sufficit, alluvione factâ, restitutus est, servitus quoque in pristinum statum restituitur. Quod si id tempus præterierit, ut servitus amittatur, renovare eam cogendus est.—Ibid.

Per agrum quidem alienum, qui servitutem non debet, ire vel agere vicino minimè licet; uti autem viâ publicâ nemo recte prohibetur.—Cod. 3, 34, 11, de serv. et aquâ

(*p*) [*Selby v. Nettlefold* (1873), L. R. 9 Ch. 111.]

## CHAPTER II.

## SECONDARY EASEMENTS.

Secondary easements implied by law.

It has been already seen, that certain easements are implied by law as incident to a grant, since without them the thing granted could not be fully enjoyed (*a*); in the same manner the express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one.

Bracton.

Bracton speaks of easements in general as appurtenances of "tenements," and of these secondary easements as appurtenances of the former:—"Omnia jura prænотата et omnes servitutes sunt de pertinentiis tenementorum, et pertinent a tenemento ad tenementa; et habent hujusmodi pertinentiæ suas pertinentias, sicut ad jus pascendi et ad pasturam pertinet via et liber ingressus et egressus. Et eodem modo ad jus fodiendi, falcandi, et secandi, hauriendi, potandi, piscandi, venandi, et hujusmodi, liber accessus et recessus, scilicet via, iter, et actus, ratione diversorum usuum ut supra. Item ad jus aquæ ducendæ pertinet purgatio. Item ad iter, secundum quod est de pertinentiis pertinentiarum, vel de pertinentiis per se, ut si via per se concedatur sine aliâ servitute, pertinet refectio, sicut ad aquæ ductum pertinet purgatio" (*b*).

This, like the general case of implied easements, is comprehended under the maxim, "Lex est cuicunque aliquis quid concedit, concedere videtur et id sine quo res esse non potuit" (*c*).

Thus, too, in the civil law, the right to a servitude drew with it a right to such secondary servitudes as were essential for its enjoyment (*d*).

Extent of dominant owner's right.

In doing the works which are necessary for the enjoyment of

(*a*) See ante, "Easements of Necessity."

(*b*) Bracton, lib. 4, f. 232 a.

(*c*) *Liford's Case* (1738), 11 Rep. 52 a. See above, p. 488.

(*d*) Qui habet haustum, iter quoque habere videtur ad hauriendum et (ut ai :

Neratius, lib. 3, *membranarum*) sive ei jus hauriendi, et adeundi cessum sit, utrumque habebit: sive tantum hauriendi, inesse et aditum, sive tantum adeundi ad fontem, inesse et haustum. Hæc de haustu et fonte privato.—Dig. , 3, 3, § 3, de serv. præd. rust.

the easement, the owner of the dominant tenement may do everything that is required for the full and free exercise of his right.

Extent of  
dominant  
owner's right.

Thus, it has been held, that the grant of a right of way, with liberty to make and lay causeways, and to use and enjoy the same, with wains, carts, waggon, and other carriages, and to carry coals, authorized the grantee to lay a framed waggon-way (*e*). "The question is," said Ashurst, J., in his judgment in that case, "whether, under this general grant for the purpose of carrying coals among other things, he has a right to make *any such way* as is necessary for the carrying of that commodity. There are no great collieries in the northern part of the kingdom where they have not those framed waggon-ways. And the case itself expressly states, that the defendant cannot so commodiously enjoy this way in any other manner. Therefore, under the original grant, he has a right to make a framed waggon-way along the slip of land in question, which is necessary for the purpose of carrying his coals, it being in the contemplation of the parties at the time of making the grant" (*f*).

*Senhouse v.  
Christian.*

Thus, too, in *Gerrard v. Cooke* (*g*), where the grant was made of a piece of land, as a foot or causeway, with "all other liberties, powers, and authorities incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage," it was held, that the grantee had a right to put a piece of flag-stone upon a part of the land in front of a door opened by him from his house, it being proved that it was usual to put down such flag-stones before doorways, and that the doorway in question could not have been so conveniently used without it (*h*).

*Gerrard v.  
Cooke.*

[In *Finlinson v. Porter* (*i*), the grantee of an easement of a drain, with a right to enter and repair it, was held entitled to deepen it in order to adapt it to the sewer as altered by the local authority.

*Finlinson v.  
Porter*

(*e*) *Senhouse v. Christian* (1787), 1 T. R. 560. [Cf. *Bishop v. North* (1843), 12 L. J. N. S. Exch. 362.]

(*f*) In an early case, 6 Edw. 4, it was held, that a man was not justified to enter for the purpose of repairing unless the way was altogether impassable; it was not sufficient that it could not be used so conveniently as before; and on the inconvenience to the party entitled to the way being urged, and that he would be without remedy, Suit, J., said, "If he went that way before in his

shoes, let him now pluck on his boots." —Cited 2 Doug. 747, 4th ed. This, however, is clearly not law.

(*g*) (1806), 2 Bos. & Pul. N. R. 109.

(*h*) *Duncombe v. Randall* (1628), Hetley, 32 or 34; *Brown v. Best* (1747), 1 Wilson, 174; *Weld v. Hornby* (1806), 7 East, 195; 8 R. R. 608; *Hodgson v. Field* (1806), 7 East, 613; 8 R. R. 701.

(*i*) (1875), L. R. 10 Q. B. 188. Dist. *Taylor v. Corporation of St. Helen's* (1877), L. R. 6 Ch. Div. 264.



Extent of  
dominant  
owner's right.

[“ If you grant to me over a field a right of carriage-way to my house, I may enter upon your field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way” (k).]

In *Knox v. Sansom* (l), it was held upon the evidence that a right of way for carriages and carts included the right of turning.]

According to *Dand v. Kingscote* (m), the grantee of a mine is entitled to a wayleave “reasonably sufficient” to enable the grantee to get the coals.

Civil law.

By the civil law the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude, so long as he did not impose any additional burthen upon the servient heritage (n). And this right extended to the justification of any trespass committed by him and his workmen on any part of the servient heritage (loci quæ non servient), in the execution of such works as were necessary for the enjoyment of the servitude (o). And the owner of the servient tenement was prevented from doing on the land, not only anything immediately injurious to the easement, but anything which, by obstructing the incidental right of repair, would indirectly be productive of the same consequence: in addition to which, in the case of a watercourse, the servient tenement was expressly subjected to the obligation of leaving a passage for the nearest access of the owner of the dominant tenement and his workmen, and also a sufficient space on each side of the stream for depositing the necessary materials (p).

So, too, if the easement were a right of way, which could not

(k) Per Jessel, M. R., in *Newcomen v. Coulson* (1877), L. R. 5 Ch. Div. at p. 143. Cf. *Abson v. Fenton* (1823), 1 B. & C. 195.

(l) (1877), 25 W. R. 864.

(m) (1840), 6 M. & W. 198; 55 R. R. 560. Cf. *Batten Pooll v. Kennedy*, [1907] 1 Ch. 256.

(n) Quintus Mucius scribit, cum iter aquæ vel quotidianæ, vel æstivæ, vel quæ intervalla longiora habeat, per alienum fundum erit, (licere) fistulam suam vel fictilem, vel cujuslibet generis in rivo ponere, quæ aquam latius exprimeret; et quod vellet in rivo facere licere, dum ne domino prædii aquagium deterius faceret.—Dig. 8, 3, 15, de serv. præd. rust.

(o) Sed et depressurum vel adlevaturum rivum, per quem aquam jure duci potestatem habes; nisi si, ne id faceres,

cautum sit.—Dig. 8, 4, 11, com. præd.

(p) Refectionis gratiâ, accedendi ad ea loca, quæ non servant, facultas tributa est his, quibus servitus debetur: qua tamen accedere eis sit necesse: nisi in cessione servitutis nominatim præfinitum sit, quâ accederetur; et ideo nec secundum rivum, nec supra eum, si forte sub terrâ aqua ducatur, locum religiosum dominus soli facere potest, ne servitus intereat; et id verum est.—Ibid.

Si prope tuum fundum jus est mihi aquam rivo ducere, tacita hæc jure sequuntur—ut reficere mihi rivum liceat: ut adire, quâ proxime possem ad reficiendum eum ego, fabrique mei: item, ut spatium relinquat mihi dominus fundi, quo, dextrâ et sinistrâ, ad rivum adeam, et quo terram, limum, lapidem, arenam, calcem jacere possim.—Ibidem, § 1.

be enjoyed without the construction of works (*opere facto*), the grant carried with it a right to dig and lay materials upon the soil (*q*); or if the position of the servient land were higher than the house to which the right was granted, and no level passage existed across the land, to cut steps or slopes in the soil for the more convenient use of the easement, provided no greater injury were committed than was necessary for the enjoyment of the right of way (*r*).

Extent of  
dominant  
owner's right.

But in doing these works for the enjoyment of an easement, the owner of the dominant tenement must not do anything to alter the accustomed mode of enjoyment in such a manner as to impose a greater burthen upon the servient tenement.

No unneces-  
sary damage  
to be done to  
servient  
tenement.

"I agree with the proposition," said Rooke, J., in the case of *Gerrard v. Cooke*, "that the grantee may use the way in the manner which is most convenient to himself, if he does not thereby produce inconvenience to the grantor;" a position with which Chambre, J., agreed, observing, "if any injury had been sustained by the grantor, it might make a difference."

"*Reficere autem est*," says Bracton, "*id quod corruptum est in pristinum statum reformare*. Ei vero permittitur reficere et purgare rivum qui jus habet servitutis, et qui aquæ ducendæ causâ id fecit. In pristinum statum dico, quia si quis rivum deprimit vel attollit, dilatat vel extendit, operit apertum vel quâ per excessum delinquit" (*s*).

Bracton.

"Sed non potest quis sub specie refectionis deterius aliquid facere, nec altius nec latius nec humilior nec longius aliquid facere" (*t*).

So also by the civil law, a party entitled to a right of way could not compel the owner of the land to allow him to repair it with stones (*silice*), unless there was an express stipulation to that effect. "Sed de refectione viæ et interdicto uti possumus, quod de itinere actuque reficiendo competit; non tamen, si silice quis sternere velit: nisi nominatim id convenit" (*u*).

Civil law.

(*q*) Si iter legatum sit, qua, nisi opere facto, iri non possit, licere fodiendo, substruendo, iter facere, Proculus ait.—Dig. 8, 1, 10, de serv.

(*r*) Si domo mea altior area tua esset, tuque mihi per aream tuam in domum meam ire agere cessisti, nec ex plano aditus ad domum meam per aream tuam esset, vel gradus, vel olivos, propius

januam meam jure facere possum; dum ne quid ultra, quam quod necesse est, itineris causâ demoliar.—Dig. 8, 2, 20, § 1, de serv. præd. urb.

(*s*) Lib. 4, ff. 233, a. [Dist. *Finlinton v. Porter*, above, p. 493.]

(*t*) Lib. 4, ff. 234 b.

(*u*) Dig. 8, 5, 4, § 5, si serv. vind.

No unnecessary damage to be done to servient tenement.

In like manner, a party having the right of receiving water through a pipe could not substitute for it a stone conduit. "Rectè placuit, non aliàs per lapidem aquam duci posse, nisi hoc in servitute constituendâ comprehensum sit; non enim consuetudinis est, ut qui aquam habeat, per lapidem statum ducat: illa autem, quæ ferè in consuetudine esse solent, ut per fistulas aqua ducatur, etiam si nihil sit comprehensum in servitute constituendâ, fieri possunt; ita tamen, ut nullum damnum domino fundi ex his detur" (x). But he had a right even without any express stipulation to repair it in the ordinary way, provided he thereby did no unnecessary harm to the owner of the land.

Dominant owner bound to repair damage done.

In entering upon the neighbouring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labours might have caused to the servient tenement (y). This, however, must not be confounded with damage to the servient tenement naturally arising from the easement itself, as where a stream of water overflowed its banks in consequence of rain or the rising of a new spring in it (z).

As, however, these ancillary servitudes were only conferred for the full enjoyment of the primary servitude, they ceased upon its extinction (a).

Restoration of servitude to its original condition.

As a general rule, the right of repair extended no farther than to restore the servitude to its original condition (ad pristinam formam (b)); though such restored servitude needed not to be specifically in the same state; thus a bridge might be built, if the way were otherwise impassable (c).

(x) Dig. 39, 3, 17, § 1, De aquâ et aq. pl. arc.

(y) Si fistulæ per quas aquam ducas, ædibus meis applicatæ, damnum mihi dent, in factum actio mihi competit; sed et damni infecti stipulari à te potero.—Dig. 3, 2, 18, de serv. præd. urb.

(z) Servitus naturaliter, non manu-facto, lædere potest fundum servientem; quemadmodum si imbro crescat aqua in rivo, aut ex agris in eum confluat, aut aquæ fons secundum rivum, vel in eo ipso inventus postea fuerit.—Dig. 8, 3, 20, § 1, de serv. præd. rust.

(a) Labeo ait: si is, qui haustum habet, per tempus, quo servitus amittitur, ierit ad fontem, nec aquam hauserit, iter

quoque eum amisisse.—Dig. 8, 6, 17, quemad. serv. amit.

(b) Reficere sic accipimus, ad pristinam formam iter et actum reducere: hoc est, ne quis dilatet, aut producat, aut deprimat, aut exaggeret—et aliud est enim reficere, longe aliud facere.—Dig. 43, 19, 3 § 15, de itinere.

(c) Apud Labeonem queritur—si pontem quis novum velit facere viæ muniendæ causâ: an ei permittatur? et ait permittendum, quasi pars sit refectiois hujusmodi munitio. Et ego puto veram Labeonis sententiam, si modo sine hoc commeari non possit.—Ibid. § 16.

It might be provided by express stipulation, that the owner of the dominant tenement should not have any right to repair, or only to a certain extent (*d*).

Rights of dominant owner may be affected by express stipulation.

[The incidents or secondary easements discussed in this chapter form, in most cases, one entire right with the principal easement (*e*).]

(*d*) Fieri autem potest, ut qui jus eundi habeat et agendi, reficiendi jus non habeat; quia in servitute constituendâ cautum sit, ne ei reficiendi jus sit; aut sic, ut si velit reficere, usque

ad certum modum reficiendi jus sit.—  
Ibid. § 14.

(*e*) *Peter v. Daniel* (1848), 5 C. B. 568; *Beeston v. Weate* (1856), 5 El. & Bl. 986.

## CHAPTER III.

## EXTENT AND MODE OF ENJOYMENT.

Dominant owner not to extend his enjoyment.

As every easement is a restriction upon the rights of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction (*a*). Supposing no express grant to exist (*b*), the right must be limited by the amount of enjoyment proved to have been had (*c*).

Thus, it is laid down in Rolle's Abridgment—if A. be seised in fee, and grant to B. a right of way to a certain close, B. cannot use that way to go to other closes without first going to the close specified in the grant (*d*). But it was said that if a defendant justifies under a right of way from D. to Blackacre, if the plaintiff replied that at the time of the trespass the defendant went with his carriages from D. to Blackacre, and thence to a mill, the replication would not support the action, for when he was in Blackacre he might go where he pleased (*e*). But it seems, that if a man have a way for carriages from D. to Blackacre over my close, and afterwards he purchase land adjoining to Blackacre, he cannot use the aforesaid way with carriages to the land adjoining, though he go first to Blackacre and from thence to the land adjoining, for this might be greatly prejudicial to my close; but it seems that if I wish to help myself I ought to show this special matter, and that he uses it for the land adjoining (*f*).

(*a*) [See, as to light, *Ankersen v. Connolly*, [1906] 2 Ch. 544; [1907] 1 Ch. 678.]

(*b*) [In the case of express grants, the easement may be such as altogether to exclude the owner of the servient tenement from participation, as where the exclusive use of a drain is granted; see *Lee v. Stevenson* (1858), El. Bl. & El. 512; *Goodhart v. Hyett* (1883), L. R. 25 Ch. D. 182, 190; *Reilly v. Booth* (1890), 44 Ch. Div. 12. And see *Rhodes v. Bullard* (1806), 7 East, 116, for an instance of a right in the nature of an easement determinable on the removal

of the subject-matter. With regard to express grants of ways, see above, p. 367 et seq. Cf. also, upon the question of express grant, *Tan Diemen Land Co. v. Marine Board of Table Cape*, [1906] A. C. 92.]

(*c*) [See per Kekewich, J., *Milners Safe Co., Ltd. v. Great Northern and City Railway*, [1907] 1 Ch. 208, at p. 220.]

(*d*) *Chemin private*, A. (Comment poet estre use), pl. 1, *Hodder v. Holman*.

(*e*) *Ibidem*, pl. 2, *Saunders v. Moss*. Vide *Stott v. Stott* (1812), 16 East, 343; 14 R. R. 354.

(*f*) *Chemin private*, pl. 3, S. C.

Dominant  
owner not to  
extend his  
enjoyment.

In the later case of *Laughton v. Ward* (g), the defendant justified under a right of way for carts and carriages to a close called C. The plaintiff replied that the defendant drove the carts to C., and also further to D. The plaintiff upon demurrer to the rejoinder had judgment; and it was resolved, "that the defendant had not pursued his prescription, for the prescription is to go to C; that when he goes to C., and farther to D., he has not authority to do it." And Powell, J., jun., said, "That the difference is, where he goes farther, to a mill or a bridge, there it may be good; for by the same reason, if the defendant purchases 1,000 closes, he may go to them all, which would be very prejudicial to the plaintiff." And for authorities they relied upon 1 Rolle, Abr. 391, pl. 3; 1 Mod. 190 (h); 3 Keble, 348 (i).

So, in *Senhouse v. Christian*, where a right of way was granted, with liberty to make causeways, &c., it was held that no right was conferred upon the party to make a transverse way, which would have imposed an additional burthen upon the servient tenement (k).

[In *Harris v. Flower & Sons* (l) the point was neatly raised. *Harris v. Flower.* In that case it was claimed that a grant of a right of way to the defendants' predecessor in title did not authorize the use of the way as a means of access to buildings erected, subsequently to the date of the grant, partly on the land to which the right of way was appurtenant, and partly on other land, the buildings on the other land having no means of access except over the way in question. Swinfen Eady, J., before whom the action was tried, treated the question rather as one of construction, and as being governed by the decisions in *United Land Co. v. Great Eastern Rail. Co.* (m), *Newcomen v. Coulson* (n), and *Finch v. Great Western Rail. Co.* (o), and held, following those decisions, that, the user by the defendants being bonâ fide for the purpose of access to the land to which the right of way was appurtenant, and none the less so

(g) (1697), 1 Lord Raymond, 75; S. C., 1 Lutwyche, 111, nom. *Laughton v. Ward.*

(h) [*Howell v. King*, 1686.]

(i) See per Parke, B., in *Colchester v. Roberts* (1839), 4 M. & W. 774, acc.; and see *Cowling v. Higginson* (1838), 4 M. & W. 245; *Dand v. Kingscote* (1840), 55 R. R. 560; 6 M. & W. 174; [*Skull v. Glenister* (1864), 16 C. B. N. S. 81; *Williams v. James* (1867), L. R. 2 C. P. 577; *Bidder v. North Staffordshire Rail.*

*Co.* (1878), L. R. 4 Q. B. Div. 412; *Finch v. Great Western Rail. Co.* (1879), L. R. 5 Exch. D. 254; *Somerset v. Great Western Rail. Co.* (1882), 46 L. T. Rep. 883.]

(k) (1787), 1 T. R. 560; 1 R. R. 300.

(l) (1905), 90 L. T. 669; on appeal, 91 L. T. 816.

(m) Above, p. 360.

(n) Above, p. 361.

(o) Above, p. 363.

Dominant  
owner not to  
extend his  
enjoyment.

*Harris v.  
Flower.*

[because a portion of the building erected on that land extended beyond its boundary, the defendants were entitled to the user of the right of way claimed by them and the action failed.

But this decision was reversed by the Court of Appeal on the ground that the user claimed by the defendants was in excess of the grant and would increase the burden on the servient tenement.

*Finch v.  
G. W. Rail.  
Co.*

In *Finch v. Great Western Rail. Co. (o)*, by virtue of an award made under an Inclosure Act, a way was to "remain a private carriage road and drift way for the use of the respective owners and occupiers for the time being of" the land over which the way passed and other specified premises. Part of the land over which the way passed, which had been pasture land, was converted by the defendant company into a cattle pen for storing cattle in transit, and the user of the way was thereby much increased. It was, however, held that the railway company were justified in the new user.

It is to be observed that the new user in effect imposed on the servient tenement a liability in respect and for the benefit of the railway company's whole railway system, and not merely of the land over which the way passed, which, under the terms of the award above cited, would appear to have been expressly made the dominant tenement. This difficulty was discussed and explained in *Harris v. Flower & Sons (p)* by Romer, L. J., in whose judgment the following passage occurs: "As to *Finch v. Great Western Rail. Co.*, that, no doubt, is a case of considerable difficulty—one which is upon the border line. I gather that the judges in that case came to the conclusion that what the railway company were doing was done in substance for the due enjoyment of the dominant land. They were using the dominant land for the purpose of penning cattle, and no doubt the cattle were intended ultimately to be sent all over the railway system. But the ground of the decision was that the railway company were entitled to use the dominant land for the purpose of a cattle pen just as they might have erected a slaughter-house upon it. To my mind that case only turned on the question of fact whether what the railway company did was for the enjoyment of the dominant tenement in accordance with the right of way granted."

(o) (1879), L. R. 5 Ex. D. 254; above, p. 363.

(p) Above, p. 499.

[The question, in all cases one of construction, whether the grant is for a limited purpose or a general grant, has already been discussed (*p*).]

If a man increases the size of an ancient window (*q*), it is clear that he has no title to the additional quantity of light thus received by him (*r*). Alteration of dominant tenement.

[It has also been decided that the dominant tenement, having ancient windows overlooking the servient tenement, may not be so altered as to make the unobstructed access of light to the ancient windows more necessary to the enjoyment of the dominant tenement than they were before the alteration, so as to render actionable an obstruction which would not, before the alteration, have been an illegal interference with the right.

Thus, in *Ankerson v. Connelly* (*t*), the dominant tenement was originally so lighted, otherwise than by means of certain ancient windows, as to have ample light without the light coming through those windows, and an obstruction of those windows would not therefore have been actionable under the rule laid down in *Colls v. Home and Colonial Stores, Ltd.* (*s*); subsequently an alteration was made in the dominant tenement, whereby practically the whole of the light other than that coming through the ancient windows was excluded, and the unobstructed access of light through those windows rendered of supreme importance to the dominant tenement. It was held that an increased burden was sought to be imposed on the servient tenement, and that the proprietor thereof was entitled to obstruct the ancient lights in the same manner and to the same extent as he would have been entitled to do before the alteration of the dominant tenement.] *Ankerson v. Connelly.*

How far such alteration operates to defeat the right altogether will be hereafter considered (*u*).

So, too, by the civil law, a party entitled to a flow of water, for irrigation or other purposes, was not allowed to impart the use of it to his neighbours (*x*); nor, as it appears, even if he himself Civil law.

(*p*) Above, p. 357; cf., as to a reservation of the free running of water and soil, *Chadwick v. Marsden* (1867), L. R. 2 Exch. 285.

(*q*) [Cf., as to watercourses, *Taylor v. Corporation of St. Helen's* (1877), L. R. 6 Ch. Div. 264; *Freehette v. Compagnie Manufacturière de St. Hyacinthe* (1883), L. R. 9 Ap. Cas. 170.]

(*r*) [But he may obtain increase of light by altering his mode of framing

and glazing; *Turner v. Spooner* (1861), 1 Drew. & Sm. 467; 7 Jur. N. S. 1068; and see post.]

(*s*) [1904] A. C. 179; above, p. 324.

(*t*) [1906] 2 Ch. 544; [1907] 1 Ch. 678.

(*u*) Post, Part V. Chap. II. Sect. 3.

(*x*) Ex meo aquæ ductu, Labeo scribit, cuilibet posse me vicino commodare; Proculus contra, ut ne in meam partem fundi aliam. quam ad quam servitus



Alteration of  
dominant  
tenement.

purchased the adjoining lands would he be entitled to take a larger quantity of water than before for the use of his estate (*y*); for in determining the amount of a servitude, regard is to be had to the accustomed mode of enjoyment rather than the necessity of the dominant tenement. A party having acquired the easement *tigni immittendi*, could not increase the number of beams which his neighbour was bound to support, and might be compelled to remove any additional ones inserted by him (*z*).

Pulling down  
for purpose  
of repair.

The pulling down of a house for the purpose of repair does not, by the law of England, even when construed most strictly, cause the loss of any easement attached to it, if it be accompanied by an intention, acted upon within a reasonable time, of rebuilding it (*a*).

Civil law.

By the civil law, the mere destruction either of the dominant or servient tenement extinguished a servitude, though it was held to revive if the house was built on the same site and of the same dimensions as before (*b*).

Alteration in  
mode of  
enjoyment.

A mere alteration in the mode of enjoyment, as the change of a mill from a fulling to a grist mill, or the like (*c*), whereby no injury is caused to the servient heritage, or a trifling alteration in the course of a watercourse (*d*), does not destroy the right.

Civil law.

By the civil law, the owner of the dominant tenement might make any alteration in the mode of enjoying his servitude, provided he thereby imposed no additional burthen on the servient heritage; he might make the condition of his neighbour better, but not worse (*e*).

*adquisita sit, uti ea possit. Proculi sententia verior est.*—Dig. 8, 3, 24, de serv. præd. rust.

(*y*) *Non modus prædiorum, sed servitus aquæ ducendæ terminum facit.*—Cod. 3, 34, 12, de serv. et aquâ.

(*z*) *Si, cum meus proprius esset paries, passus sim (te) immittere tigna, quæ antea habueris, si nova velis immittere, prohiberi à me potes; imo etiam agere tecum potero, ut ea quæ nova immiseris, tollas.*—Dig. 8, 5, 14, si serv. vind.

(*a*) *Luttrell's Case* (1738), 4 Rep. 86. [And this intention will be presumed, no evidence of the intention being necessary. *Smith v. Baxter*, [1900] 2 Ch. 138. The reason is obvious, viz., that it is incidental to all houses to be repaired and at some time to be rebuilt, and the right when acquired is acquired for the tenement with such incidents. If

this were not so, no prescriptive right could be acquired in respect of a mesuage or any artificial structure.] See also *Moore v. Rawson*, post, "Extinguishment of Easements."

(*b*) *Si sublatum sit ædificium ex quo stillicidium cadit, ut eâdem specie et qualitate reponatur, utilitas exigit, ut idem intelligatur: nam alioquin, si quid strictius interpretetur, aliud est, quod sequenti loco ponitur; et ideo, sublato ædificio, usufructus interit, quamvis area pars est ædificii.*—Dig. 8, 2, 20, § 2, de serv. præd. urb.

(*c*) *Luttrell's Case* (1738), 4 Rep. 86; [*Bazendale v. McMurray* (1867), L. R. 2 Ch. 790.]

(*d*) *Hall v. Swift* (1838), 6 Scott, 167; 4 Bing. N. C. 381.

(*e*) Dig. 8, 2, 20, § 5, de serv. præd. urb. post.

This, however, must be taken with some qualification when applied to the case of natural easements. The owner of land in which a spring took its rise, or upon which rain fell, was allowed, for the necessary purposes of cultivation, a reasonable degree of liberty in changing the course of the water running to his neighbour's land, though he might thereby make the servitude more burdensome.

Alteration of  
dominant  
tenement.

"It seldom happens," says Pardessus (*f*), "that running water, which takes its rise on an estate, or even the rain water which falls upon it, is absorbed there and escapes without any apparent issue. Some mode of discharge is then necessary; and it is in the obligation to suffer this discharge that, by the Code (*g*), consists the subjection of the inferior heritage towards those whose lands are more elevated, to receive the waters which flow from them naturally. Even if this discharge should be prejudicial to the plantations of the inferior heritage, or should prevent its cultivation by bringing down upon it stones and sand, no action could be maintained for the damage so done. No one is responsible for the effects of nature (*h*). The case even cannot be excepted, where for more than thirty years (*i*), whether from causes purely natural, such as the scarcity of water, whether from the sole act of the proprietor, as, for example, if he had kept the water, or in any other manner which offered a large service for evaporation, the spring should have had no issue upon the inferior heritage. As such rights as are imposed by the general law, and the nature of things, are not lost by mere non-user, whatever time may have elapsed."

Pardessus.

"The same article adds, that 'this obligation applies only to the waters which flow naturally without any act of man'; those which come either from springs or from rain falling directly on the heritage, or even by the effect of the natural disposition of the places, are the only ones to which this expression of the law can be applied. He who, for whatsoever use it may be, shall employ in his house, or on his heritage, water which he drew from a well, reservoir, &c., cannot discharge it (*faire couler*) upon the inferior heritage without the permission of the proprietor. A man who devotes his heritage to a species of cultivation requiring

(*f*) *Traité des Servitudes*, § 82 (7th ed. 113).

(*g*) *Code Civil*, Art. 640.

(*h*) *Quod si naturâ aqua noceret eâ*

*actione non continentur*.—Dig. 39, 3, 1, § 1, *de aq. et aq. pl. arc.*

(*i*) That is to say, the period of prescription by the French law.

Alteration of  
dominant  
tenement.  
Pardessus.

frequent irrigation, ought to make at the extremities of his land ditches to receive the surplus water which, without this precaution, might percolate to his neighbour's land. The latter might with reason contend that such a process is not natural, and would not have taken place but for the act of man (*k*). Conformably to this principle, the Code (*l*) does not permit the discharge of water from a roof or the neighbouring land, even though it might happen that, were the site of the building unoccupied (vague), the rain which fell there would by a natural servitude flow into the neighbouring land."

"It would appear, however, to be a false application of these principles to consider as the act of man the fall of water from a fountain newly opened, even though the opening has been caused by the labour of the proprietor of the land. If any contest arose as to the obligation to receive the water, the question for the tribunals to decide would be—upon which heritage the water would most naturally fall."

"It is not, however, to be understood that, because the flow of water must not be caused by the act of man, therefore the proprietor who transmits water to the inferior heritage is not permitted to do anything on his own land; that he is condemned to abandon it to a perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law could not have had this intention; it prohibits only the emission into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow" (*m*).

(*k*) Idemque ait, et ex superiore in inferiora non aquam, non quid aliud immitti licet; in suo enim alii hæcenus facere licet, quatenus nihil in alienum immittat.—Dig. 8, 5, 8, § 5, si serv. vind.

(*l*) Art. 681.

(*m*) Hæc autem actio locum habet in damno nondum facto, opere tamen jam facto; hoc est, de eo opere, ex quo damnum timetur; totiensque locum habet, quotiens manu facto opere agro aqua nocitura est; id est, cum quis manu fecerit, quo aliter fluere, quam naturâ solet, si forte immittendo eam aut majorem fecerit, aut citiorem, aut

vehementiorem; aut si comprimendo redundare effecit; quod si naturâ aqua noceret, ea actione non continentur.—Dig. 39, 3, 1, § 1, de aq. et aq. pl. arc.

De eo opere, quod agri colendi causâ aratro factum sit, Quintus Mucius ait, non competere hanc actionem. Trebatius autem, non quod agri, sed quod frumenti duntaxat querendi causâ aratro factum sit, solum excepit.—Ibid. § 3.

Sed et fossas agrorum siccandorum causâ factas, Mucius ait fundi colendi causâ fieri; non tamen (oportere) corrivandæ aquæ causâ fieri; sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.—Ibid. § 4; vide etiam §§ 5—11.

In the American Courts questions have frequently arisen upon the conflicting claims of different owners of land adjacent to a stream, where no exclusive right has been acquired by any party.

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dominant  
tenement.

"The proprietor of a watercourse," says Mr. Justice Story, "has a right to avail himself of its momentum, as a power which may be turned to beneficial purposes, and he may make such a reasonable use of the water itself for domestic purposes, for watering cattle, or even irrigation, provided it is not unreasonably detained or essentially diminished; for although, by the case of *Weston v. Alden* (n), the right of irrigation might seem to be general and unlimited, yet subsequent cases have restrained it consistently with the enjoyment of the common bounty of nature by other proprietors, through whose land a stream had been accustomed to flow, and the qualification of the right by these decisions is in accordance with the common law" (o).

American  
decisions.

The general principle governing this point is thus stated by Chancellor Kent in his learned Commentaries (p):—

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use for it while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it."

"This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application."

"The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water."

(n) 7 Maas. 136.

N. S. R. 397.

(o) *Tyler v. Wilkinson*, 4 Mason,

(p) 3 Kent, Comm. 439.

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tenement.

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decisions.

Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water."

"All that the law requires of the party, by and over whose land a stream passes, is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water by the proprietors below on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, 'that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below.' But this must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned; otherwise rivers and streams of water would become entirely useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law:—*'Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat'*" (q).

Easements  
severed on  
severance of  
dominant  
tenement.

[It has been already (r) observed that,] if a severance of the dominant tenement takes place, all its easements, which are attached to the tenement, and not to the person of the owner, will attach to the severed portions (s); if a house be divided into two

(q) [The English law on this subject has been already discussed, ante, p. 239 et seq.]

(r) Above, p. 86.

(s) *Tyrringham's Case* (1738), 4 Rep.

36 b; *Wyat Wild's Case* (1738), 8 Rep. 78 b; *Harris v. Drewe* (1831), 2 B. & Ad. 164; 36 R. R. 527. [See the judgment of Bayley, J., in *Codling v. Johnson* (1829), 9 B. & C. 934; *Bower v. Hill*

distinct tenements, each of these will retain the original right to have the windows unobstructed.

**Easements severed on severance of dominant tenement.**

It is obvious, however, that, by such severance, no right is acquired to impose an additional burthen on the servient tenement. However numerous the occupants of the severed tenement may be, they must still confine themselves within the limits of the right existing at the time of severance.

The civil law distinctly recognized the doctrine, that the dominant tenement continued to enjoy its servitudes, notwithstanding a severance (t).

As it is the duty of the owner of the dominant tenement not to do any act which imposes an additional burthen upon the owner of the servient tenement, so the latter must do no act which interferes with the exercise of the right already acquired, or those secondary easements which are requisite for its full and free enjoyment (u). If his wall be liable to an easement of support to a neighbouring house, he must not (except for the purpose of necessary repair) pull down, or otherwise weaken the wall, so as to make it incapable of rendering the requisite degree of support (x); he must not plough up a footpath across his field (y), [or build a wall at the end of it, so as to prevent the grantee from going beyond (z),] or drive stakes to obstruct a watercourse flowing to a mill (a), even though the stream be incapable of use at the place where the obstruction is made from the want of cleansing (b).

**Duty of servient owner.**

It is even said by Jones, J., in *James v. Hayward* (c), that he must not erect a gate across a footway running over his land.

There is a deficiency of authority upon the question—whether the owner of the servient tenement is considered as the author of

**Whether liable for obstruction**

(1835), 2 Bing. N. C. 339; 41 R. R. 636; and *Newcomen v. Coulson* (1877), L. R. 5 Ch. Div. 133. Dist. *Midland Rail. Co. v. Gribble*, [1895] 2 Ch. 827, where the easement was created for the purpose of affording communication between the two tenements while in the same hands.]

(t) Si stipulator decesserit pluribus hæredibus relictis, singuli solidam viam petunt.—Dig. 8, 1, 17, de serv.

Si prædium tuum mihi serviat, sive ego partis prædii tui dominus esse cœpero, sive tu mei, per partes servitus retinetur, licet ab initio per partes adquiri non poterit.—Ibid. 8, § 1.

(u) Bracton, lib. 4, ff. 233, post.

Si totus ager itineri, aut actui servit, dominus in eo agro nihil facere potest,

quo servitus impediatur, quæ ita diffusa est, ut omnes glebæ serviant.—Dig. 8, 3, 13, § 1, de serv. præd. rust.

(x) *Brown v. Windsor* (1830), 1 Cr. & J. 20.

(y) 2 Rolle, Abr. Nusans, G. pl. 1.

(z) *Phillips v. Treeby* (1862), 8 Jur. N. S. 711, 999; 3 Giff. 632.

(a) Rolle, ubi sup., pl. 8, 9. [As to diversion, see *Northam v. Hurley* (1853), 1 E. & B. 665; *Whitehead v. Parks* (1858), 2 H. & N. 870; *Kensit v. Great Eastern Rail. Co.* (1884), L. R. 27 Ch. Div. 122. Cf. *Pirie v. Kintore* (Earl), [1906] A. C. 478.]

(b) *Bowser v. Hill* (1835), 1 Bing. N. C. 555; 41 R. R. 630.

(c) (1631), Sir W. Jones, R. 221.

Duty of servient owner.

caused by roots of trees, &c.

*Hall v. Swift.*

an obstruction to the easement arising entirely from the growth of the roots or branches of trees standing on his soil, and therefore liable for the consequences (*d*).

In the case of *Hall v. Swift* (*e*), an action was brought for disturbing the plaintiff in the enjoyment of a watercourse. "The only positive obstruction by the act of the defendant that appeared was, that, upon two or three occasions, he had directed his servants to place a turf at the embouchure of a stream, for the purpose of irrigating his field, the ultimate stoppage being occasioned by the intrusion of the roots of a tree growing upon the defendant's land, whose fibres grew into and filled up the channel." The jury found that the defendant had "obstructed the plaintiff in the enjoyment of the water"; and the Court, after consulting the learned judge who tried the cause, and who reported "that the facts had been fully and fairly left to the jury, and that he was satisfied with their finding," refused to disturb the verdict.

By the civil law he was liable.

By the civil law, the servient owner was not allowed to plant trees, or do any other act, so as to obstruct the passage of light to a window enjoying the servitude—"ne luminibus officiat" (*f*); and the further progress of a work already commenced might be stopped on the same grounds (*g*). To render a man liable to an action for the discharge of rain-water upon his neighbour's land, such water must have been diverted from its natural course by some act of man (*opus manufactum*); and this consequence was held to ensue when the diversion was caused by planting a bed of willows (*h*).

The real question appears to be, whether, in contemplation of law, the damage is the result of the act of man in planting the trees, however long the time may be before they become injurious; or whether it arises solely from the act of nature. In the latter case it is clear no right of action would accrue; "actus Dei nemini facit injuriam." In the former case he would, of course, be liable. And it would appear that, in this case, he is liable—for every consequence is considered to result from an act of man,

Semble, also liable by the

(*d*) Cf. above, p. 473.

(*e*) (1838), 6 Scott, 167; 4 Bing. N. C. 381; 44 R. R. 728.

(*f*) Si arborem ponat, ut lumini officiat, æque dicendum erit, contra impositam servitutem eum facere—nam et arbor efficit, quo minus cœli videri possit.—Dig. 8, 2, 17, de serv. præd. urb.

(*g*) Quodcumque igitur faciat ad lumi-

nis impedimentum, prohiberi potest, si servitus debeatur: opusque ei novum nunciari potest, si modo sic faciat, ut lumini noceat.—Ibid. 15.

(*h*) Sed apud Servii auctores relatam est, si quis salicta posuerit, et ob hoc aqua restagnaret, "aquæ pluvie arcedæ" agi posse, si ea aqua vicino noceret.—Dig. 39, 3, 1, § 6, de aqu. et aqu. pluv. arc.

which proceeds from an act of volition on his part, and the operation of the ordinary natural causes: the growth of a tree, when planted, is no more the effect of natural causes alone, than that fire should communicate from one field to another by an ordinary wind; or that a stone, when flung, should strike an object at which it is aimed.

Duty of servient owner.

law of England.

The servient owner has likewise his rights: the dominant owner's encroachments can be justified only to the extent of his easement; as to all beyond that, his acts constitute a private nuisance for which an action may be maintained (*i*). With regard, therefore, to all artificial easements, he is bound to keep his works in such a state, that they shall cause no inconvenience to the neighbour beyond that warranted by the easement (*j*); and if he neglects this, he brings himself within the ordinary case of a violation of the rule, "Sic utere tuo ut alienum non lædas," and is of course liable to an action.

Rights of servient owner.

The servient owner has in this, as in other cases of nuisance, the privilege of taking the remedy into his own hands. The reformation of a nuisance, as appears from Bracton, is not confined to the case of prostration, but the party aggrieved by the nuisance arising from the want of repair of a neighbouring edifice, may himself do the necessary acts, "vel relevari vel reparari si querens ad hoc sufficiat" (*k*).

To do necessary repairs.

By the civil law it was expressly provided that the servient owner might compel the dominant to keep in repair his artificial works (*l*). In the case of natural servitudes no action lay for any

Civil law.

(i) [*Humphries v. Cousins* (1877), L. R. 2 C. P. D. 239; *Att.-Gen. v. Acton Local Board* (1882), L. R. 22 Ch. D. 221; *Brown v. Corporation of Dunstable*, [1899] 2 Ch. 378; cf. *Canadian Pacific Rail. Co. v. Parks*, [1899] A. C. 535. As to his remedy by obstruction, see post, Part V. Chap. II. Sect. 3.]

(j) See per Parker, J., in *Jones v. Pritchard*, reported in *Times Newspaper*, Feb. 7th, 1908.

(k) Lib. 4, ff. 233 a.

(l) Aggerem, qui in fundo vicini erat, vis aquæ deiecit: per quod effectum est, ut aqua pluvia mihi noceret. Varus ait, si naturalis agger fuit, non posse me vicinum cogere "aquæ pluvie arcendæ" actione, ut eum reponat vel reponi sinat. Idemque putat, et si manufactus fuit neque memoria ejus exstaret—quod si exstet, putat "aquæ pluvie arcendæ"

actione eum teneri. Labeo autem, si manufactus sit agger, etiamsi memoria ejus non exstat, agi posse, ut reponatur: nam hæc actione neminem cogi posse, ut vicino prosit, sed ne noceat, aut interpellet facientem quod jure facere possit. Quamquam tamen deficiat "aquæ pluvie arcendæ" actio: attamen opinor utilem actionem vel interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro ejus, qui factus mihi quidem prodesset potest, ipsi vero non nociturus est; hæc æquitas suggerit, etsi jure deficiamus.—Dig. 39, 3, 2, § 5, de aq. et aq. pl. arc.

Trebatius existimat, si de eo opere agatur, quod manufactum sit, omnimodo restituendum id esse ab eo, cum quo agitur: si vero vi fluminis agger deletus sit, aut glareæ injecta, aut fossa limo repleta, tunc patientiam duntaxat præstandam.—Ibid. 11, § 6.



Rights of servient owner.

Civil law.

change produced by causes entirely independent of the act of man, and each party was in general compelled to submit to the inconvenience or entitled to the benefit of all changes effected by the hand of nature in the condition of his tenement. If, however, a reparation could be effected which in no respect deteriorated the condition of the dominant, while it rendered less onerous that of the servient owner, it seems that the latter might himself perform the necessary repairs: thus, if by accretions of mud or other natural causes, the flow of the stream became irregular, and consequently injurious to the servient owner, he might enter on the adjoining land and cleanse the stream, provided he thereby did no injury to his neighbour (*m*).

Vague grant of easement, how assigned.

Where a right of way is granted generally, or arises by implication of law, questions have arisen as to the part of the land over which the way shall be taken—which party is entitled to assign the way—and under what restrictions such right must be exercised. The opinions expressed on these points appear to be somewhat at variance with each other.

Expressed opinions at variance.

It is laid down in Rolle, Abr. (*n*), “that the grantor shall assign the way (of necessity) where he can best spare it”; while, in a case in Siderfin (*o*), Glyn, C. J., says, “that the defendant (the grantee) may take a convenient way without permission of the grantor; and if he taketh what is inconvenient, or too much, the law shall adjudge it.”

Mansfield, C. J., in *Morris v. Edgington* (*p*), appears to have been of opinion that a party entitled to a way of necessity might take that which was most convenient for the enjoyment of the premises demised to him (*q*).

(*m*) Apud Namusam relatum est,—si aqua fluens iter suum stercore obstruxerit, et ex restagnatione superiori agro noceat, posse cum inferiore agri, “ut sinat purgari”; hanc enim actionem non tantum de operibus esse utilem manufactis, verum etiam in omnibus, quæ non secundum voluntatem sint. Labeo contra Namusam probat; ait enim naturam agri ipsam a se mutari posse: et ideo, cum per se natura agri fuerit mutata, æquo animo unumquemque ferre debere, sive melior sive deterior ejus conditio facta sit. Ideo, et si terræ motu, aut tempestatis magnitudine, soli causa mutata sit: neminem cogi posse, ut sinat in pristinam loci conditionem

redigi. Sed nos etiam in hunc casum æquitatem admisimus.—Ibid. 2, § 6.

(*n*) Tit. Grants, 2, pl. 17, vol. 2, p. 60.

(*o*) *Packer v. Welsted* (1658), 2 Sid. 112.

(*p*) (1810), 3 Taunt. 24; 12 R. R. 579.

(*q*) [See also *Abson v. Fenton* (1823), 1 B. & C. 195; and, as to a way of necessity, above, p. 182.

It seems that a way may be defined by usage: *Deacon v. South Eastern Rail. Co.* (1889), 61 L. T. 377; and an American case, *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222.]

If, however, the right of way has once been assigned, its course cannot be altered by either party without the consent of the other. Vague grant of easement, how assigned.

“If A. has a way through the land of B., and B. ploughs up the soil where the way was used, and leaves another part of the same close for a way, A. may use the ancient tract, and need not go where the way is assigned *de novo*” (r).

By the civil law a distinction appears to have existed between those cases in which the servitude, in general terms, was imposed by will, and where it was created by any act *inter vivos*. In the former case, the option of allotting the position and direction of the servitude was with the heir, provided he did nothing to injure the rights of the party to whom the servitude was devised (s): in the latter case, unless the instrument contained some express stipulations in this respect, the grantee was at liberty to select such portion of the servient heritage as was most suitable to him, although, in this case also, certain restrictions were imposed, as that he should not use his servitude to the damage of the grantor's house, gardens, or vineyards (t). Civil law.

If, however, the party so entitled once made his choice, he was no longer at liberty to select a new direction for the exercise of his servitude (u).

(r) Com. Dig. Chimin, D. (5); Noy, 128; [*Deacon v. South Eastern Rail. Co.*, ubi sup. Dist. *Cooke v. Ingram* (1893), 68 L. T. 671, where the dominant owner, having a right of way from every part of his tenement, was held not to have limited the right by the use of one mode of access only.]

(s) Si via, iter, actus, aqueductus legetur simpliciter per fundum, facultas est hæredi, per quam partem fundi velit constituere servitutem; si modo nulla captio legatario in servitute sit.—Dig. 8, 3, 26, de serv. præd. rust.

(t) Si locus, non adjectâ latitudine, nominatus est, per eum qualibet iri poterit. Sin autem prætermisus est, (locus) æque latitudine non adjectâ, per totum fundum, una poterit eligi via, duntaxat ejus latitudinis, quæ lege comprehensa est; pro quo ipso, si dubitabitur, arbitri officium invocandum est.—Ibid. 13, § 3.

Si cui simpliciter via per fundum cuiuspiam cedatur, vel relinquatur, in infinito (videlicet per quamlibet ejus partem) ire agere licebit; civiliter modo. Nam quædam in sermone tacitè excipiuntur; non enim per villam ipsam,

nec per medias vineas ire agere sinendus est: cum id æque commodè per alteram partem facere possit, minore servientis fundi detrimento.—Dig. 8, 1, 9, de serv.

Sed quæ loca ejus fundi tunc, cum ea fieret cessio, ædificiis, arboribus, vineis vacua fuerint, ea sola eo nomine servant.—Dig. 8, 3, 22, de serv. præd. rust.

Si mihi concesseris iter aquæ per fundum tuum, non destinatâ parte, per quam ducerem—totus fundus tuus serviet.—Ibid. 21.

(u) Verum constitit, ut, qua primum viam direxisset, eâ demum ire agere deberet, nec amplius mutandæ ejus potestatem haberet; sicuti Sabino quoque videbatur; qui argumento rivi utebatur—quem primo qualibet ducere licuisset, posteaquam ductus esset, transferre non liceret; quod et in viâ servandum esse verum est.—Dig. 8, 1, 9, de serv.

At si iter actusve sine ullâ determinatione legatus est; modo determinabitur: et, qua primum iter determinatum est, eâ servitus constitit: cæteræ partes agri liberæ sunt. Igitur arbitri dandus est, qui utroque casu viam determinare debet.—Dig. 8, 3, 13, § 1, de serv. præd. rust.

## PART V.

## OF THE EXTINGUISHMENT OF EASEMENTS.

THE modes by which easements may be lost correspond with those already laid down for their acquisition :—1. Corresponding to the express grant is the express renunciation ; 2. To the disposition by the owner of two tenements, the merger by the union of them ; 3. To the easement of necessity, the permission to do some act which of necessity destroys it (*a*) ; 4. And to the acquisition by prescription, abandonment by non-user.

## CHAPTER I.

## BY EXPRESS RELEASE.

Must be  
under seal.

It would appear that, in the case of easements, as of other incorporeal rights, an express release, to be effectual [at law], must be under seal (*b*). This rule, however, must not be taken to exclude a written instrument not under seal, or even a parol declaration, as evidence to show the character of any act done, or any cessation of enjoyment. [And in equity an easement may be lost or modified by agreement (*c*).]

Acts of  
Parliament.

Acts of Parliament by which easements are destroyed have the operation of express releases ; [and it is proposed here to consider some enactments having this effect.

[(*a*) As to the extinguishment of easements of necessity, see p. 178.]

(*b*) Co. Litt. 264 b ; Com. Dig. Release (A. 1), (B. 1).

(*c*) *Fisher v. Moon* (1865), 11 L. T.

N. S. 623 ; *Waterlow v. Bacon* (1866), L. R. 2 Eq. 514. Cf. *Salaman v. Gleser* (1875), L. R. 20 Eq. 444, where a lease was held to be controlled by the terms of a prior agreement ; and see above, p. 31.

[By the eighth section of the General Inclosure Act of 1801 (*d*), the commissioners under special Acts are authorized and required, before making the allotments directed, "to set out and appoint the public carriage roads and highways through and over the lands and grounds intended to be divided, allotted and inclosed, and to divert, turn and stop up any of the roads and tracks (*e*) upon and over all or any part of the said lands and grounds"; but no "old or accustomed road" passing or leading (*f*) through any part of the old inclosures in the parish is to be stopped up without the order of two local justices of the peace not interested in the repair of such road. The tenth section of the same Act empowers such commissioners as above mentioned to set out and appoint such private roads, bridleways, footways, ditches, drains, watercourses, &c., in, over, upon, and through or by the sides of the allotments to be made, as they may think requisite, subject to certain formalities therein referred to. And by the eleventh section of the same Act it is enacted, "that, after such public and private roads and ways shall have been set out and made, . . . all roads, ways and paths over, through, and upon such lands and grounds which shall not be set out as aforesaid, shall be for ever stopped up and extinguished, and shall be deemed and taken as part of the lands and grounds to be divided, allotted, and inclosed, and shall be divided, allotted, and inclosed accordingly,"—subject only to a proviso requiring, for the diversion of a turnpike road, the consent of a majority of the trustees.

Release by  
Act of  
Parliament.  
General  
Inclosure  
Act, 1801.

It was held by the Court of Common Pleas in the case of *White v. Reeves* (*g*), that the proviso in section eight which forbids the commissioners to close an "old or accustomed road" leading through old inclosures without the order of two justices, applied only to public roads. But in *Harber v. Rand* (*h*), the Court of Exchequer came to the opposite conclusion, and held that, in order effectually to stop up even a private road, the commissioners must obtain the positive and specific order of two justices. The case of *Thackrah v. Seymour* (*i*) might appear to support the decision of the Court of Exchequer; but the judgment shows that the way

(*d*) 41 Geo. 3, c. 109.

(*e*) Including foot-roads; *Logan v. Burton* (1826), 5 B. & C. 513; 29 R. R. 308.

(*f*) I.e., as to any part of such road; *ibid.*

(*g*) (1818), 2 Moore, 23; 19 R. R. 536.

(*h*) (1821), 9 Price, 58; 23 R. R. 638; *White v. Reeves* was not quoted.

(*i*) (1832), 1 Cr. & Mee. 18, Exch. of Pleas; 38 R. R. 575.

Release by  
Act of  
Parliament.

[there in question was a public one, and the later cases (*k*) rather support *White v. Reeves*.

Inclosure  
Act, 1845.

Under the Inclosure Act of 1845, which also provides that private roads not set out by the valuer are to be extinguished, it is clear that no order of justices is required (*l*).

Lands and  
Railways  
Clauses Acts.

Where lands compulsorily taken under the Lands Clauses Consolidation Act, 1845 (*m*), or the Railways Clauses Consolidation Act, 1845 (*n*), are subject to an easement, the person entitled to the easement cannot bring an action for disturbance; nor is he entitled to notice to treat. His remedy is by claiming compensation as for lands injuriously affected (*o*).

Of course, if the Act confers no power to interfere with the easement, the remedy is by action (*p*).

In *Wells v. London, Tilbury and Southend Rail. Co.* (*q*), it was held that a clause in a private Act extinguishing, without compensation, "all rights of way in, over, and affecting" certain "footways" was intended to affect only public rights, and did not extinguish a private right of way by agreement over one of the footways specified.

(*k*) *Holden v. Tilley* (1859), 1 F. & F. 650, a nisi prius case, very shortly reported; *Race v. Ward* (1857), 7 E. & B. 384, Q. B., not really a decision on the point.

(*l*) See 8 & 9 Vict. c. 118, ss. 62—68; and *Turner v. Crush* (1879), L. R. 4 App. Cas. 221. As to what "old inclosures" are referred to, see *Hornby v. Silvester* (1888), L. R. 20 Q. B. Div. 797.

(*m*) 8 & 9 Vict. c. 18.

(*n*) 8 & 9 Vict. c. 20.

(*o*) See, under the Lands Clauses Act, *Eagle v. Charing Cross Rail. Co.* (1867), L. R. 2 C. P. 638; *Duke of Bedford v. Dawson* (1875), L. R. 20 Eq. 363; *Wigram v. Fryer* (1887), L. R. 36 Ch. D. 87; *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437; *Manchester, Sheffield, and Lincolnshire Rail. Co. v. Anderson*, [1898] 2 Ch. 394; *Long Eaton Recreation Grounds, Ltd. v. The Midland Rail. Co.*, [1902] 2 K. B. 574; and *Barnard v. Great Western Railway*, [1902] 86 L. T. 798; and under the Railways Clauses Act, *Hutton v. London and South-Western Rail. Co.* (1848), 7 Ha. 259; 82 R. R. 99; *Caledonian Rail. Co. v. Walker's Trustees* (1882), L. R. 7 App. Cas. 259; *Ford v. Metropolitan and Metropolitan District Rail. Cos.* (1886),

L. R. 17 Q. B. Div. 12; *Reg. v. Poulter* (1887), L. R. 20 Q. B. D. 132; *In re London, Tilbury, and Southend Rail. Co. and Trustees of Gower's Walk Schools* (1889), L. R. 24 Q. B. Div. 326; *Emsley v. North-Eastern Rail. Co.*, [1896] 1 Ch. 418. And cf., under an earlier private Act, *Thicknesse v. Lancaster Canal Co.* (1838), 4 M. & W. 472; under the Waterworks Clauses Act, 1847, *Bush v. Troubridge Watercorks Co.* (1875), L. R. 10 Ch. 459; and *Holliday v. Mayor, &c. of Wakefield*, [1891] A. C. 81; under the Thames Embankment Act, 1862, *Macey v. Metropolitan Board of Works* (1864), 10 Jur. N. S. 333; 33 L. J. Ch. 377; under the Elementary Education Act, 1870, *Clark v. School Board for London* (1874), L. R. 9 Ch. 120; *London School Board v. Smith*, W. N. 1895, p. 37; and *Kirby v. Harrogate School Board*, ubi sup.; and under the Artisans' and Labourers' Dwellings Improvement Act, 1875, *Badham v. Marris* (1882), 45 L. T. Rep. N. S. 579; *Swainston v. Finn* (1883), 52 L. J. Ch. 235; 48 L. T. Rep. N. S. 634; 31 W. R. 498; and *Barlow v. Ross* (1890), L. R. 24 Q. B. Div. 381.

(*p*) *Turner v. Sheffield and Rotherham Rail. Co.* (1842), 10 M. & W. 425.

(*q*) (1877), L. R. 5 Ch. Div. 126.

[The Metropolitan Building Acts do not affect easements. The provisions which authorize the raising of party-walls confer no authority to raise them to the prejudice of a neighbour's right to light (r).]

Release by  
Act of  
Parliament.

Building  
Acts.

By the third section of the Settled Land Act, 1882 (s), a tenant for life of settled land within the meaning of the Act is empowered to sell "the settled land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same." The latter words seem only to authorize the tenant for life to subject the settled land to an easement for the benefit of some other tenement. It has been suggested (t) that, since the word "land" covers all hereditaments (u), including incorporeal hereditaments (x), a power to sell "land" includes a power to sell or release an easement appurtenant to the settled estate (y) so as to extinguish it, as well as to create and sell an easement burdening the settled land, but it has now been decided that a tenant for life has no power to release an easement appurtenant to the settled estate (z).]

Settled Land  
Act, 1882.

(r) See, e.g., on 14 Geo. 3, c. 78, *Titterton v. Conyers* (1813), 5 Taunt. 465; and *Wells v. Ody* (1836), 1 M. & W. 452; 46 R. R. 358; on 18 & 19 Vict. c. 122, §§ 83, 85, *Crofts v. Haldane* (1867), L. R. 2 Q. B. 194; and, on a Bristol Improvement Act, *Weston v. Arnold* (1873), L. R. 8 Ch. 1084. The London Building Act, 1894, contains an express provision (sect. 101) to the like effect.

(s) 45 & 46 Vict. c. 38. See also the

Settled Land Act, 1890, sect. 5.

(t) Wolstenholme's Settled Land Acts, 9th ed. p. 338.

(u) 52 & 53 Vict. c. 63, s. 3.

(x) Settled Land Act, 1882, s. 2 (10).

(y) See above, pp. 9 and 51; and cf. the judgments in *G. W. R. v. Swindon and Cheltenham Rail. Co.* (1884), L. R. 22 Ch. Div. 677; 9 App. Cas. 787.

(z) *In re Brotherton's Estate*, (1907) W. N. 230.

## CHAPTER II.

## BY IMPLIED RELEASE.

SECT. 1.—*Extinguishment by Merger.*

As an easement is a charge imposed upon the servient for the advantage of the dominant tenement, when these are united in the same owner, the easement is extinguished; the special kind of property which the right to the easement conferred, so long as the tenements belonged to different owners, is now merged in the general rights of property (*a*).

Extinguish-  
ment and  
suspension.

But in order that the easement should be entirely extinguished, it is essential that the owner of the two tenements should have an estate in fee simple in both of them of an equally perdurable nature. "Where the tenant," says Littleton, "hath as great and as high an estate in the tenements as the lord hath in the seignior, in such case, if the lord grant such services to the tenant in fee, this shall enure by way of extinguishment. *Causa patet*" (*b*). Upon which Lord Coke observes (*c*), "Here Littleton intendeth not only as great and high an estate, but as perdurable also, as hath been said, for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate as shall make an extinguishment." In a previous section, speaking of seigniories, rents, profits à prendre, &c., he says, "They are said to be extinguished when they are gone for ever, et tunc moriuntur, and can never be revived, that is, when one man hath as high and as perdurable an estate in the one as in the other" (*d*).

Unless this be the case, the easement, of whatever species it be, is suspended only so long as the unity of possession continues, and revives again upon the separation of the tenements. "Suspense cometh of suspendeo, and, in legal understanding, is taken when a seignior, rent, profit à prendre, &c., by reason of

(*a*) [*Lord Dyneror v. Tennant* (1888).  
L. R. 13 A. C. 279. Secus, as to natural  
rights; *Shury v. Pigott* (1627), below,  
p. 518; *Wood v. Waud* (1849), 3 Exch.,

at p. 775; 77 R. R. 809.]

(*b*) S. 561.

(*c*) Co. Lit. 313 b.

(*d*) Co. Lit. 313 a.

unity of possession of the seignior, rent, &c., and of the land out of which they issue, are not in esse for a time, et tunc dormiunt, but may be revived or awaked" (e).

Extinguish-  
ment and  
suspension.

So strictly has this doctrine been construed, which requires the estates in the two tenements to be of an equally high and perdurable character, that no extinguishment was held to have taken place where the king was seised of one tenement "of a pure fee simple indeterminable," jure coronæ, and of the other of an estate in fee simple, determinable on the birth of a Duke of Cornwall. *Rex v. Inhabitants of Hermitage* (f).

This principle appears to be equally applicable to all easements (g). When two tenements become completely united, and, as it were, fused into one, the owner may modify the previous relative position of the different parts at his pleasure; if he exercise this right so that the part which previously served the other no longer does so—as, for instance, by changing the direction of a spout which emptied the rain-water of one house on the adjoining one—it has never been doubted that by so doing he destroyed the easement for ever (h).

Easements  
extinguished  
by unity do  
not revive on  
severance.

But it has been contended, that if he neglect to do so, and again sever the tenements, all easements having the qualities of being both continuing and apparent, as well as those which existed by necessity, were revived upon the severance. In the 11th Henry 7 (i), it was decided, "that a customary right in the city of London to have a gutter running in another man's land was not extinguished by unity of possession." It was argued, that if the purchaser of both tenements had destroyed the gutter, the right would not have

(e) Co. Lit. 313 a.

(f) (1693), Carthew, 239. See also *Canham v. Fiske* (1831), 2 Cr. & J. 126; *Thomas v. Thomas* (1835), 2 O. M. & R. 34; 41 R. R. 678; [*James v. Plant* (1836), 4 A. & E. 766; 43 R. R. 465, where it was held that the momentary seisin of a releasee to uses was insufficient to work a merger by unity of seisin; *Simper v. Foley* (1802), 2 J. & H. 555; and *Ecclesiastical Commissioners of England v. Kinn* (1880), L. R. 14 Ch. Div. 213, where the Lords Justices refused to decide that a right to light for the windows of a church could not be acquired over the adjoining glebe, both being vested in the incumbent, but for different interests. It has been held in America that, where the dominant and servient tenements vested in the same person under separate mortgages,

there was no extinguishment of the easement before foreclosure of both mortgages (*Ritger v. Parker*, 8 Cush. (Mass.) 145). Also that, where a tenant held the servient tenement by a defective title, and the easement by a valid title, there was no merger (*Tyler v. Hammond*, 11 Pick. (Mass.) 193). And so when a person held one estate in severalty, and an undivided share of the other (*Atlanta Mills v. Masson*, 120 Mass. 244).]

(g) [And rights in the nature of easements, as the right to have fences repaired: see *Dyer*, 295 b, pl. 19; *Sury v. Pigott* (1625), *Palmer*, 444; *Boyle v. Tamlyn* (1827), 6 B. & C. 329; 30 R. R. 343.]

(h) 11 Henry 7, f. 25; *Lady Browne's Case*, cited in *Sury v. Pigott* (1625), *Palmer*, 446.

(i) Fol. 25.



Easements  
extinguished  
by unity do  
not revive on  
severance.

*Shury v.  
Pigott.*

revived; to which Danvers, J., replied, "If the matter were so, it might have been pleaded specially: it would be a good issue."

In *Shury v. Pigott* (*k*), in an action on the case for stopping a watercourse, which had been used to have its current into the plaintiff's yard, and fill a pond with water, it was held that a unity of possession of the land of the house and place to which, and of the land through which, &c., was no bar. "There is a difference," said Whitelocke, J., "between a way or common and a watercourse. These begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land—this is extinct by unity, because the greater benefit shall drown the less. A watercourse doth begin ex jure naturæ, having taken this course naturally, and cannot be averted."

In the report of this case in Latch, it is said, "Rent shall be extinguished by unity, and also a way, because it does not exist durant the unity; but it is otherwise of a thing which exists, notwithstanding the unity." A case of warren is cited from 35 Henry, f. 55, 56.

Whether  
unity of seisin  
is sufficient.

In *Buckby v. Coles* (*l*), the Court of Common Pleas intimated a decided opinion, that unity of seisin was sufficient to work an extinguishment, without actual unity of occupation. In *Drake v. Wiglesworth* (*m*), the Court doubted whether seisin implied possession; but [more recent decisions seem to have favoured the proposition] that from seisin the law will presume possession (*n*).

*Richardson v.  
Graham.*

[But in *Richardson and others v. Graham* (*o*) it was held by the Court of Appeal (*p*) that unity of seisin for an estate in fee will not cause the extinction of an easement of light where there is no unity of possession and enjoyment. In that case a tenement which had enjoyed the access of light over an adjoining tenement for upwards of twenty years was leased for a term of years to the plaintiff. Subsequently and during the continuance of this term the freeholder of the servient tenement acquired the freehold of the dominant tenement, but it was held that this unity of seisin did not operate to extinguish the plaintiff's easement of light.]

Easements re-  
sulting from

It will be found that the classes of easements with respect to

(*k*) (1625), 3 Bulstrode, 339; S. C., Palmer, 444, nom. *Sury v. Pigott*.

(*l*) (1814), 5 Taunt. 311; 15 R. R. 508.

(*m*) (1752), Willes, 658.

(*n*) *Stott v. Stott* (1812), 16 East, 343; *Clayton v. Corby* (1842), 2 Q. B. 813; 2

G. & D. 174; 57 R. R. 807. [See per Parke, B., in *England v. Wall* (1842), 10 M. & W. 701.]

(*o*) [1908] 1 K. B. 39.

(*p*) Lord Alverstone, C. J., and Buckley and Kennedy, L. JJ.

which the revivor referred to above is supposed to take place, exactly correspond with those already considered, as being acquired by the implied grant resulting either from the disposition of the owner of the two tenements, or from the easement being of necessity.

Easements extinguished by unity do not revive on severance.

It is practically immaterial whether the foundation of the right be a new grant or a revival of the old right; but the former is the more correct view of the title to them, and it is certainly more in harmony with the general principles of the law of easements (o).

disposition of owner of two tenements, or of necessity, revive.

In the civil law, on the union of two inheritances in the same owner, all servitudes were extinguished by confusion; and on any future severance it was necessary to reimpose them expressly (p).

[In the event of an easement already acquired by prescription being vested in the owner of the dominant tenement by statutory authority, the prescriptive title would merge in the statutory title, and in the event of the statutory provision being only a temporary measure the easement would be lost on the expiration of the period covered by the statute (q).

Unity by Act of Parliament.

"I hold it to be an indisputable proposition of law that where an Act of Parliament has, according to its true construction, to use the language of Littledale, J., 'embraced and confirmed' a right which had previously existed by custom or prescription that right becomes henceforward a statutory right, and that the lower title by custom or prescription is merged in and extinguished by the higher title derived from the Act of Parliament" (r).

## SECT. 2.—*Extinguishment of Necessity.*

It has already been seen, on the clearest authority both of our own law and the civil law, that if the owner of the dominant tenement authorizes an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is

Licence to obstruct.

(o) *Holmes v. Goring*, ante, p. 178; [and see p. 116.]

(p) *Servitutes prædiorum confunduntur, si idem utriusque prædii dominus esse cøperit.*—Dig. 8, 6, 1, quem. serv. amit.

Si quis ædes, quæ suis ædibus servirent, cum emisset, traditas sibi acceperit, confusas sublataque servitus est; et, si rursus vendere vult, nominatim imponenda servitus est: alioquin liberæ veniunt.—Dig. 8, 2, 30, de serv. urb. præd.

Tertio amittitur (servitus) confusione cum prædia confusa sunt, sive cum idem utriusque prædii dominus esse cøperit.—Vinnius, Comm. ad Inst. lib. 2, tit. 3, Quibus modis serv. amittuntur, § 6.

(q) *Taylor v. Aldermen and Burgesses of New Windsor*, [1898] 1 Q. B. 186; affd. in H. L. sub nom. *New Windsor Corporation v. Taylor*, [1899] A. C. 41; *Mayor, &c. of Manchester v. Lyons* (1882), 22 Ch. Div. 287.

(r) Per Lord Davey in *New Windsor Corporation v. Taylor*, [1899] A. C. 49.

to prevent his future enjoyment of the easement, it is thereby extinguished (s).

And provided the authority is exercised, it is immaterial whether it was given by writing or by parol (t).

### SECT. 3.—*Extinguishment by Cessation of Enjoyment.*

Owners of  
inheritance  
must  
acquiesce.

As the acquisition of an easement is an addition to the ordinary rights of property of the dominant, and a corresponding diminution of those rights of the servient tenement, so the loss of the easement, when once acquired, by restoring both tenements to their natural state, is an addition to the rights of the servient, and a corresponding diminution of those of the dominant.

Hence, though the law regards with less favour the acquisition and preservation of these accessorial rights than of those which are naturally incident to property, and, therefore, does not require the same amount of proof of the extinction as of the original establishment of the right (u): yet as an easement, when once created, is perpetual in its nature, being attached to the inheritance and passing with it, it should seem that some acquiescence on the part of the owner of the inheritance must be necessary to give validity to any act of abandonment (u). The doctrine of the extinction of easements by merger, already considered, supports this view, proceeding, as it does, on the ground that the loss of an easement is a permanent injury to the inheritance, and can therefore only take place when the same party is the owner of the fee simple of the servient and dominant tenements.

Prescription  
Act.

The Prescription Act is silent as to the mode by which easements

(s) *Ante*, p. 31; [and see *Davies v. Marshall* (1861), 10 C. B. N. S. 697; 7 Jur. N. S. 720, 1247; *Johnson v. Wyatt* (1864), 9 Jur. N. S. 1333.]

Si stillicidii immittendi jus habeam in aream tuam, et permiserō jus tibi in eā areā edificandi, stillicidii immittendi jus amitto. Et similiter, si per tuum fundum via mihi debeat, et permiserō tibi, in eo loco, per quem via mihi debetur, aliquid facere, amitto jus viæ.—Dig. 8, 6, 3, quem. serv. amit.

Amittitur servitus remissione, tum apertā tum tacitā—puta si permiserō domino fundi servientis, in loco serviente,

facere id quo servitus impediatur.—Vinnius, Comment. ad Inst. L. 2, Tit. Quibus modis servitutes amittuntur, § 6.

(t) *Liggins v. Inge*, ante, p. 40.

(u) "Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of that right under the (Prescription) Act," per *Stirling, J.*, [1900] 2 Ch. at p. 146.

(w) As to the loss of an inchoate right to light acquired under the Prescription Act, 1832, ss. 3 and 4, see *Hyman v. Van den Bergh*, [1907] 2 Ch. 516; [1908] 1 Ch. 167.]

may be lost. Its enactments as to interruption and disabilities apply in terms to the acquisition only.

Cessation of enjoyment.

It is the policy of the law, favouring the freedom of property, that no restriction should be imposed upon one tenement, without a corresponding benefit arising from it to another, and hence it is that it is essential to the validity of an easement that it should conduce to the more beneficial enjoyment of the dominant tenement.

Thus, where a right of way is given by deed, the right is confined to the use of a way which is "in the same predicament as it was at the time of the making of the deed" (x).

If, therefore, any alteration be made in the disposition of the dominant tenement, of such a nature as to make it incapable any longer of the perception of the particular easement, the status of the dominant tenement, to which the easement was attached, and which is an inherent condition of its existence, is determined.

Loss by alteration of dominant tenement.

Such alteration must, of course, be of a permanent character, evincing an intention of ceasing to take the particular benefit, or otherwise an easement might be lost by the mere pulling down of the tenement for the purposes of necessary repair (y). Thus, if a man have a projecting roof, by means of which he enjoyed the easement of throwing his eaves-droppings on his neighbour's land, any alteration of the form of such projection, from which it could be inferred that he meant to direct the rain-water into a different channel, would destroy his right to the easement. Thus, too, the stopping up an ancient window (z).

Alteration must be permanent.

By the civil law the pulling down a house with the intention of re-building, did not cause the loss of a servitude, provided the new edifice was erected upon the site and of the dimensions of the old, and did not increase the burthen imposed upon the servient tenement (a).

In *Moore v. Rawson* (b), it appears that the plaintiff, having

*Moore v. Rawson*

(x) Per Curiam in *Allan v. Gomme* (1840), 11 A. & E. 772; 52 R. R. 492; [but see ante, p. 357. It depends in all cases upon the construction of the particular grant, whether the owner of the servient way is limited to any particular use of the tenement.]

(y) *Luttrell's Case* (1738), 4 Rep. 86; [*Slaight v. Burn* (1869), L. R. 5 Ch. 163; *Ecclesiastical Commissioners for England v. Kino* (1880), L. R. 14 Ch. Div. 213. Cf. per Fry, J., in *National Provincial Plate Glass Insurance Co. v.*

*Prudential Assurance Co.* (1877), L. R. 3 Ch. D. 757, at p. 764.]

(z) *Laurence v. Obee* (1814), 3 Camp. 514; 14 R. R. 830.

(a) (Si servitus stillicidii non avertendi debebatur); si antea ex tegulâ cassitaverit stillicidium, postea ex tabulato, vel ex aliâ materiâ, cassitare non potest. —Dig. 8, 2, 20, § 4, de serv. præd. urb.

(b) (1824), 3 B. & C. 332; 5 Dowl. & R. 234; 27 R. R. 375.

Cessation of  
enjoyment.

*Moore v.  
Rawson.*

some ancient windows, pulled down the wall in which they were situated, and rebuilt it as the wall of a stable, without any window. About fourteen years after this, the defendant erected a building in front of this blank wall, and after such building had remained there about three years, the plaintiff re-opened a window in the place where one of the ancient windows had formerly stood, and brought this action for the obstruction to his newly-opened window by the defendant's building.

A rule having been obtained to enter a non-suit, pursuant to liberty reserved at the trial, the Court of K. B. made the rule absolute.

Abbott, C. J., in delivering his judgment, said, "I am of opinion that the plaintiff is not entitled to maintain this action. It appears that many years ago the former owner of these premises had the enjoyment of light and air by means of certain windows in a wall in his house. Upon the site of this wall he built a blank wall without any windows. Things continued in this state for seventeen years. The defendant, in the interim, erected a building opposite the plaintiff's blank wall, and then the plaintiff opened a window in that which had continued for so long a period a blank wall without windows: and he now complains that that window is darkened by the buildings which the defendant so erected. It seems to me that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that, at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, it was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burthen of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect. For these reasons I am of opinion, that the rule for a nonsuit must be made absolute."

Bayley, J., said, "The right to light, air, or water, is acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment, or shows an intention to

continue it. In this case the former owner of the plaintiff's premises had acquired a right to the enjoyment of the light; but he chose to relinquish that enjoyment, and to erect a blank wall instead of one in which there were formerly windows. At that time he ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it. Suppose that, instead of doing that, he had pulled down the house and buildings, and converted the land into a garden, and continued so to use it for a period of seventeen years, and another person had been induced by such conduct to buy the adjoining ground for the purposes of building. It would be most unjust to allow the person who had so converted his land into garden ground, to prevent the other from building upon the adjoining land which he had, under such circumstances, been induced to purchase for that purpose. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he does some act to show that he means to resume it within a reasonable time."

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enjoyment.

*Moore v.  
Rawson.*

Holroyd, J., added, "I am of the same opinion. It appears that the former owner of the plaintiff's premises at one time was entitled to the house with the windows, so that the light coming to those windows over the adjoining land could not be obstructed by the owner of that land. I think, however, that the right acquired by the enjoyment of the light continued no longer than the existence of the thing itself in respect of which the party had the right of enjoyment; I mean the house with the windows: when the house and the windows were destroyed by his own act, the right which he had in respect of them was also extinguished. If, indeed, at the time when he pulled the house down, he had intimated his intention of rebuilding it, the right would not then have been destroyed with the house. If he had done some act to show that he intended to build another in its place, then the new house, when built, would in effect have been a continuation of the old house, and the rights attached to the old house would have continued. If a man has a right of common attached to his mill, or a right of turbary attached to his house, if he pulls down the mill or the house, the right of common or of turbary will *primâ facie* cease. If he show an intention to build another mill or another house, his right continues. But if he pulls down the

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house or the mill without showing any intention to make a similar use of the land, and, after a long period of time has elapsed, builds a house or mill corresponding to that which he pulls down, that is not the renovation of the old house or mill but the creation of a new thing, and the rights which he had in respect of the old house or mill do not, in my opinion, attach to the new one (c). In this case, I think, the building of a blank wall is a stronger circumstance to show that he had no intention to continue the enjoyment of his light than if he had merely pulled down the house. In that case he might have intended to substitute something in its place. Here he does, in fact, substitute quite a different thing—a wall without windows. There is not only nothing to show that he meant to renovate the house so as to make it a continuance of the old house, but he actually builds a new house different from the old one, thereby showing that he did not mean to renovate the old house. It seems to me, therefore, that the right is not renewed, as it would have been if, when he had pulled down the old house, he had shown an intention to rebuild it within a reasonable time, although he did not do so eo instanti.”

Littledale, J.—“According to the present rule of law a man may acquire a right of way, or a right of common, (except, indeed, common appendant,) upon the land of another, by enjoyment. After twenty years’ adverse enjoyment the law presumes a grant made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. . . . I think that, if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does any thing to show that he did not mean to convert the land to a different purpose, then his right would not cease. In this case I think that the owner of the plaintiff’s premises abandoned his right to the ancient lights, by erecting the

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(c) *Crossley v. Lightowler* (1867), L. R. 2 Ch. 478; post, p. 561.

blank wall instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light which he once had. Under those circumstances I think that the temporary disuse was a complete abandonment of the right."

Cessation of  
enjoyment.

*Moore v.  
Rawson.*

In *Lawrence v. Obee* (*d*), Lord Ellenborough held that, where an ancient window had been filled up with brick and mortar for twenty years, the case stood as if it had never existed.

*Lawrence v.  
Obee.*

"Suppose a person," said Tindal, C. J., in delivering the judgment of the Court in *Liggins v. Inge* (*e*), "who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return, could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished; or that he should be compellable to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own? In such a case it would, undoubtedly, be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or left it for a temporary purpose only" (*f*).

*Liggins v.  
Inge.*

In *Hale v. Oldroyd* (*g*), the plaintiff had a right to a flow of surplus water to an ancient pond. Instead of using the water to supply that pond, he had during thirty years past used it to supply three more recent ponds. It was held, he had not abandoned or lost his right to the flow of water by such user. Rolfe, B., said, "If the plaintiff had even filled up the (old) pond, that would not in itself amount to an abandonment, although, no doubt, it would be evidence of it." [And Parke, B., said, "The use of the old pond was discontinued only because the plaintiff obtained the same or a greater advantage from the use of the three new ones; he did not thereby abandon his right, he only exercised it in a different spot,—and a substitution of this nature is not an abandonment."]

*Hale v.  
Oldroyd.*

In *Stokoe v. Singers* (*h*), it was held that, where the owner of a house had blocked up ancient windows, and kept them so for nearly twenty years, he had not lost the right of light, the jury finding that he did not "so close up his lights as to cause the

*Stokoe v.  
Singers.*

(*d*) (1814), 3 Camp. 514; 14 R. R. 830.

(*e*) (1831), 7 Bing. 693; 33 R. R. 615, Preface VI.

(*f*) [See *Crossley v. Lightowler* (1867), L. R. 2 Ch. 478; post, p. 561.]

(*g*) (1845), 14 M. & W. 789; 69 R. R. 824.

(*h*) (1857), 8 E. & B. 31.



Cessation of  
enjoyment.

*Stokes v.  
Singers.*

[adjoining owner to incur expense or loss on the reasonable belief that they had been permanently abandoned," nor so as "to manifest an intention of permanently abandoning the right of using them"; but the Court did not express any opinion upon the question whether the mere closing up of the lights, so as to manifest an intention of permanently abandoning them, would destroy the right, unless the adjacent owner acted upon that intention; and there appears to have been some difference of opinion between the judges upon this question.

*Ecclesiastical  
Commissioners v.  
Kino.*

In *Ecclesiastical Commissioners v. Kino* (k), it appeared that, by virtue of an Act of Parliament and an Order in Council, the church of St. Dionis Backchurch in the city of London had become vested in the Commissioners upon trust to pull down the church, dispose of the materials, and sell the site. The church having been pulled down, but not yet sold, the defendant commenced to build upon the adjoining land some buildings which would have obstructed the access of light to the ancient church windows had they still been subsisting. Hall, V.-C., refused an injunction; but, on appeal, the defendant was restrained from "obstructing the lights of any building to be erected on the site of the church, so far as such lights occupy the same position as the lights of the church." The Court of Appeal thought that the Commissioners, though not themselves empowered to rebuild, were entitled to sell the land with all its advantages, including the right to rebuild so as to resume the enjoyment of the ancient lights. "It appears to me," said James, L. J., "that, where a building in which there are ancient lights has been taken down, though the actual enjoyment of the light has been suspended, there is nothing to prevent the owner from applying to the Court for an injunction to restrain an erection which would interfere with the easement of the ancient lights, where the Court is satisfied that he is about to restore the building with its ancient lights. That was so decided by Lord Justice Giffard in *Staigt v. Burn*" (l).]

Material ques-  
tion, intention  
to renounce  
right.

It appears from these cases that the law has fixed no precise time during which this cessation of enjoyment must continue;—the material inquiry in every case of this kind must be, whether there was the intention to renounce the right. [There is a legal

(k) (1880), L. R. 14 Ch. Div. 213.

(l) (1869), L. R. 5 Ch. 163.

[inference, however, at any rate in cases where the dominant tenement has been pulled down and rebuilt, that the owner intends to preserve his rights; and accordingly it has been held in a case in which a building was rebuilt before a right to light had been acquired under the Prescription Act, but whilst it was in course of being so acquired, that evidence of the intention to preserve ancient lights upon a rebuilding is unnecessary (*m*).] From the language of the judges [in the cases before *Stokoe v. Singers*], it does not appear to be necessary that the servient owner should have done any act after the change had taken place in the dominant tenement to assert the freedom of his tenement from the easement; but it is sufficient if the consequence of the change be an entire cessation of enjoyment, accompanied by an intention [on the part of the dominant owner] to relinquish the right. In point of fact, in one of the cases above cited, the owner of the servient tenement had, during the cessation of enjoyment, done an act which he could not lawfully have done had the easement existed, and the owner of the dominant tenement had taken no steps to remove the obstruction; yet no stress was placed upon these circumstances. [And the dicta in *Stokoe v. Singers*, in which such an act is treated as essential in order to make out the loss of the easement, have never been followed.]

Cessation of  
enjoyment.

By the civil law an urban servitude could not be lost by mere abandonment on the part of the owner of the dominant, unless, during the cessation of enjoyment, some act was done by the owner of the servient tenement evincing an intention of defeating the servitude—as if a man having a window should have stopped it up during a certain time, a previously acquired easement of the passage of light would not have been lost, unless the owner of the servient tenement had done something during the interval to obstruct the passage of light: so, too, in the case of an easement *tigni immittendi*, mere removal of the beam was not sufficient to defeat the right, unless the owner of the servient tenement stopped up the hole in which the beam was placed (*n*); and, on the same ground, by no lapse of time would the right be lost during which,

Civil law required some act to be done by servient owner.

(*m*) *Smith v. Baxter*, [1900] 2 Ch. 138. This decision was based upon a passage in the judgment of Cotton, L. J., in *Scott v. Pape* (1886), 31 Ch. Div. 554; but, though the judgments in this case were criticised in *Colls v. Home and*

*Colonial Stores, Ltd.*, [1904] A. C. 179, it does not appear that the decision in *Smith v. Baxter* is thereby affected. See *Andrews v. Waite*, [1907] 2 Ch. 500, 509.

(*n*) *Hæc autem jura similiter, ut rus-*

Cessation of enjoyment.

owing to the delay in rebuilding the servient tenement, the easement could not be exercised (o).

Although, however, there appears to be no [sufficient] authority in our law for requiring any such act as the condition of the extinction of an easement, yet such an act, unopposed by the owner of the dominant tenement, as in the case of *Moore v. Rawson*, would be almost conclusive evidence that there was no intention to preserve the easement.

Alteration by encroachment.

A question of much greater difficulty arises in those cases in which there has been no actual cessation of enjoyment, but the mode of enjoyment has been more or less altered; and where, instead of an intention to relinquish the right, an attempt has been made to usurp a greater right than the party was entitled to, [or to enjoy it in a different manner (p)].

Assuming that the encroachment confers no new right, two questions arise:—1st, whether a valid easement still subsists to the extent previously enjoyed; and, 2ndly, if this be determined in the negative, whether the party is still at liberty to restore his tenement to its former condition, and recur to its former mode of enjoyment.

The first question may be considered with reference to two distinct classes of easements:—those which require for their enjoyment a permanent adaptation of the state of the dominant tenement; and those which depend upon repeated acts of man, and require no permanent alteration in the dominant tenement, as rights of way, or to draw water (q).

ticorum quoque prædiorum, certo tempore non utendo pereunt; nisi quod hæc dissimilitudo est, quod non omnimodo pereunt non utendo; sed ita si vicinus simul libertatem usucapiat, veluti si ædes tuæ ædibus meis serviant “ne altius tollantur,” “ne luminibus mearum ædium officiantur”; et ego per statutum tempus fenestras meas præfixas habuero vel obstruxero; ita demum jus meum amitto, si tu per hoc tempus ædes tuas altius sublata habueris; alioquin si nihil novi feceris, retineo servitutem. Item si “tigni immissi” ædes tuæ servitutem debent, et ego exemero tignum, ita demum amitto jus meum, si tu foramen unde exemptum est tignum obturaveris et per constitutum tempus ita habueris; alioquin, si nihil novi feceris, integrum jus meum

permanet.—Dig. 8, 2, 6, de serv. præd. urb.

(o) Si cum jus haberes immittendi, vicinus statuto tempore ædificatum non habuerit, ideoque nec tu immittere poteris, non ideo magis servitutem amittes; quia non potest videri usucapisse vicinus tuus libertatem ædium suarum, qui jus tuum non interpellavit.—Dig. 8, 6, 18, § 2, quem. serv. amit.

(p) E.g., by altering the plane of a window or the course of a stream (and cf. *Mercer v. Denne*, [1904] 2 Ch. 534; [1905] 2 Ch. 538). This method of alteration is distinguishable from mere encroachment; but the cases are so much intermixed that it is impossible to separate them in statement.

(q) This question is discussed with reference to the latter class, post, p. 566.

With respect to those easements which require for their enjoyment a permanent adaptation of the state of the dominant tenement, it is extremely difficult to reconcile the [earlier] decisions, or to extract any clear or intelligible principle from them; but it appears [even in the earlier cases] to be admitted that, if the alteration in the mode of enjoyment is such as clearly not to render the easement more onerous on the owner of the servient tenement, the right remains unimpaired; [on the other hand it may be considered as settled that any alteration in the dominant tenement which imposes an additional burden on the servient tenement, will certainly suspend the right, and may destroy it altogether (g)].

Alteration by  
encroach-  
ment.

Where  
dominant  
tenement  
permanently  
altered.

The cases are numerous, but it will be well to go through them in their order.]

In *Cherrington v. Abney* (r), a bill was filed for an injunction to prevent stoppage of lights; there being six lights in an old house, it was insisted, that "in the new they should have but the same number of lights, and of the same dimensions, and in the same places, or else may stop up and blind them.

*Cherrington v.  
Abney.*

"So must not make more stories, more lights, nor in other places.

"It is certain they cannot alter the same to the prejudice of the owner of the soil—as if before so high as they could not look out of them into the yard, shall not make them lower, and the like; for privacy is valuable.

"One trial had another granted."

[The above dicta can no longer be relied upon as good law.

In *East India Company v. Vincent* (s), Lord Hardwicke said: "If I should give an opinion that lengthening of windows, or making more lights in the old wall than there were formerly (t), would vary the right of persons, it might create innumerable disputes in populous cities, especially in London; and, therefore,

*East India Co.  
v. Vincent.*

(g) See *Ankerson v. Connelly*, post, p. 548.

(r) (1709), 2 Vernon, 646, cor. King, L. C.

(s) (1740), 2 Atk. 83.

(t) It must be borne in mind, in considering the cases cited, that since it has been settled by the decision in *Colls v. Home and Colonial Stores, Ltd.*, that the

dominant tenement is not entitled to all the light coming through the windows, but only so much as is necessary to render the occupation of the dominant tenement reasonably comfortable, the enlargement of windows in the dominant tenement would not increase the burden imposed on the servient tenement, but would have the contrary effect; see post, p. 547.

Alteration by  
encroach-  
ment.

[I do not give an absolute opinion, but I should rather think it does not vary the right."]

*Cotterell v.  
Griffiths.*

In *Cotterell v. Griffiths* (u), it appeared that the plaintiff's windows had never been completely opened until a short time before the action was brought, but there had been blinds sloping upwards without giving any view over the defendant's premises. Lord Kenyon ruled that, the defendant having by his act made the plaintiff's windows darker than they were when the blinds were up, the action was sustainable.

*Martin v.  
Goble.*

In *Martin v. Goble* (x), where a building having been used for upwards of twenty years as a malthouse was converted into a dwelling-house, McDonald, C. B., held that "the house was entitled to the degree of light necessary for a malthouse, and not for a dwelling-house; the converting it from one to the other could not affect the rights of the owners of the adjoining ground; no man could, by any act of his, suddenly impose a new restriction upon his neighbour." [This decision was expressly dissented from in *Moore v. Hall* (y), but the decision in *Colls v. Home and Colonial Stores, Ltd.* (z), having settled that the easement of light is and always has been a question of nuisance or no nuisance, it would seem that, unless the building, though used as a malthouse, was so well lighted as to enable it to be converted into a dwelling-house without the addition of any new windows or any increase in the size or form of the existing windows (upon which point the report is silent), the decision might be supported on the ground that the question of whether or not an obstruction was a nuisance must be decided by reference to the easement acquired by the former enjoyment (a), and that the addition to or alteration in the windows on the conversion of the building into a dwelling-house would increase the burden on the servient tenement (b). The concluding words of the passage above quoted were cited, apparently with approval, in *Colls v. Home and Colonial Stores, Ltd.*]

*Chandler v.  
Thompson.*

In *Chandler v. Thompson* (c), it appeared "that there had been for many years a small window in the place in question. About

(u) (1801), 4 Esp. 69.

(x) (1808), 1 Camp. 332.

(y) (1878), L. R. 3 Q. B. D. 178.

(z) [1904] A. C. 179; see above, p. 324.

(a) See the judgment of Lord

Chelmsford in *Tapling v. Jones*, post, p. 544.

(b) *Colls v. Home and Colonial Stores, Ltd.* (ubi sup.), per Lord Lindley at p. 211; and see per Lord Davey, at pp. 201, 202.

(c) (1811), 3 Camp. 80; 13 R. R. 756.

three years before the action was brought the plaintiff considerably enlarged it, both in height and width, and put in a sash frame instead of a leaded casement (*d*). The defendant, who was the owner of the adjoining ground, then covered several inches of the space occupied by the old window, but still admitted more light to pass through the new window than the plaintiff had enjoyed before the alteration." Le Blanc, J., ruled, "that the whole space occupied by the old window was privileged, and that it was actionable to prevent the light and air passing through as it had formerly done. That part of the new window which constituted the enlargement might be lawfully obstructed; but the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources."

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*Chandler v.  
Thompson.*

In *Garritt v. Sharp* (*e*), it appeared that, for upwards of twenty years, the building in question had been a barn, on the side of which, abutting on the defendant's premises, were several apertures, about one or two inches wide, through which light and air passed to the barn, the only other opening being the barn door: the plaintiff's case was, that these openings were made for the purpose of admitting light and air; the defendant contended that they had been caused by decay and wear, by the boards shrinking. In 1833 the plaintiff turned the barn into a malthouse, stopped some of the crevices, and converted others, by cutting, into windows, to which he put lattices. The defendant then erected a wall which prevented the access, not only of any additional light which might have been obtained by the alteration, but also, as the plaintiff alleged, of that quantity which came into the building in its original state. The defendant (as was stated on the motion for a new trial) offered evidence to show that the alteration in the mode of admitting light to the plaintiff's building was injurious to the defendant's adjoining property; such evidence, however, was not received. Tindal, C. J., left it to the jury to say, whether the apertures were originally placed there on purpose to admit light, and whether the defendant had obstructed any portion of the light (*f*) admitted; and in case of their find-

*Garritt v.  
Sharp.*

(*d*) See note (*i*), p. 529.

(*e*) (1835), 3 A. & E. 325; S. C., 4 N. & M. 834.

(*f*) The word "originally" seems to have been omitted here; there was no question that *some* light had been obstructed.

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*Garritt v.  
Sharp.*

ing in the affirmative on these questions, he directed them, if the light now fell short of the quantity before enjoyed by the plaintiff for the use of his barn, to give damages for such diminution. The jury found for the plaintiff. A new trial was moved for—first, on the ground of misdirection, on which it was contended, that “the proof given respecting the apertures in the barn did not entitle the plaintiff to any enjoyment of windows which admitted light more extensively, and in an entirely different manner; and that no licence for such an enjoyment could be presumed from the licence, if proved, to have crevices in the wall of the barn.” The rejection of evidence above mentioned was also relied on as a ground for a new trial.

The Court granted a new trial, principally, as it should seem, on the ground that, “although the point was made, yet the jury were not required by the judge to consider whether the plaintiff had essentially varied the manner in which the light was enjoyed.” In the concluding part of the judgment is the following passage: “It is enough to say, that a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether; and, in this case, some part, even of the plaintiff’s proofs, made it proper that the opinion of the jury should be taken upon that subject.”

[The decision did not proceed on the enlargement only, and possibly not at all. It was suggested in argument that the manner of introducing light was entirely altered; and Lord Denman observed that, while the old openings could not overlook the neighbouring premises, the windows might. But it may be doubted whether this could be a sufficient reason for depriving the dominant tenement of the easement of light; and probably the decision could not now be relied on as a precedent.]

*Blanchard  
v. Bridges.*

In *Blanchard v. Bridges* (*f*), the alteration of the windows, upon which the question arose, was assumed by the Court in their judgment to consist of “a carrying out of the walls (in which the windows were), five feet, in the same direction;” and, it should seem, an alteration of their shape into bay-windows,—the original wall having been destroyed.

Patteson, J., in delivering the judgment of the Court, said, “As to the windows at the east, the case finds that they do not occupy the places of the old windows: the wall, in which those windows

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(*f*) (1835), 4 A. & E. 176; 5 Nev. & Man. 567; 53 R. R. 208.

were, no longer exists; and, assuming that no greater change of position has been made than is necessarily consequent upon a carrying out of the side walls five feet, and converting the termination into a bow, such a change is, in our opinion, sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and, as the act of the one is inferred from the enjoyment of the other owner, it must, in reason, be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given. It appears to us that convenience and justice both require this limitation; if it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented if it had come in question in the first instance. The case of *Chandler v. Thompson* (g) is not at all inconsistent with this reasoning. There, an ancient window had been enlarged; the original aperture remained: and the case only decided that *that aperture* remained privileged as before the enlargement. We do not forget that the windows in the present case, whatever their privilege may be, do not claim it as *ancient* windows in the ordinary way from an acquiescence of twenty years; but this circumstance furnishes no ground for any distinction as to the point now under consideration."

The Court also decided that the plaintiff had acquired no easement even for the original windows.

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encroachment.

*Blanchard v.  
Bridges.*

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(g) (1811), 3 Campb. 80; 13 R. R. 756.



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[This decision also, if not actually overruled by *Tapling v. Jones* (h), must now be held limited to cases where the right in question arises by express grant and not by enjoyment under the statute (i).

*Arcedekne v. Kelk.*

In *Arcedekne v. Kelk* (k), a plaintiff who in a trivial degree had herself obstructed the light and air to her dwelling was held not to have thereby lost the right to complain of an obstruction by the defendant.]

*Luttrell's Case.*

Similar questions have arisen in the cases of other easements. In *Luttrell's Case* (l) an action was brought for the diversion of water. The declaration stated that "the plaintiff, on the 4th of March in the 40th year of Elizabeth, was seised in fee of two old and ruinous fulling-mills, and that from time whereof, &c., magna pars aquæ ejusdam rivuli ran from a place called Hod Weir to the said mills; and that for all the said time there had been a bank to keep the water within the current; and that afterwards the plaintiff, on the 8th October, 41 Eliz., pulled down the said fulling-mills, and in June, 42 Eliz., in place of the said fulling-mills erected two mills to grind corn, and said water ran to the said mills until the 10th September next following; and the same day the defendants foderunt et fregerunt the bank, and diverted the water from his mills, &c.

"The defendants pleaded not guilty, and it was found against them, on which the plaintiff had judgment; upon which the defendant brought a writ of error in the Exchequer Chamber, on which two errors were assigned. The principal of these was, that, by the breaking and abating of the old fulling-mills, and by the building of new mills of another nature, the plaintiff had destroyed the prescription and could not prescribe to have any water-course to grist-mills: 'As if a man grants me a water-course to my fulling-mills, I cannot, as it was said, convert them to corn-mills, nec e contra.'

"One of these cases cited in argument was from 10 Hen. 7, 13 a, b, and 16 Hen. 7, 9 a, b, 'where the abbot of Newark granted by fine to find three chaplains in such a chapel of the conusee; afterwards the said chapel fell, and there tenetur—(during the time there is no chapel), the divine service shall cease,

(h) (1865). 11 H. L. C. 290, below, p. 539. See per North, J., in *Scott v. Pape* (1886), L. R. 31 Ch. Div. at p. 561.

(i) Per Bowen, L. J., *ibid.* p. 573.

(k) (1858), 2 Giff. 683.

(l) (1738), 4 Rep. 86, a.

for it ought to be done in a decent and reverend manner, and not at large, sub dio ; but tenetur, if the chapel is rebuilt in the same place where the old stood, then he ought to do the divine service again ;' but (it was collected) if it is built in another place, then the grantee is not bound to do divine service there.

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*Luttrell's Case.*

"The next case cited strongly supports the principle that an alteration, whereby a greater burthen would be imposed, destroys the right altogether. 'If there be lord and tenant, and the tenant holds to cover and repair the lord's hall, as in the 10 Edw. 3, 23, in this case, if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it ; but if it is of greater length or breadth, so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cow-house, a stable, a kitchen, or the like, he is not bound to cover it ; for the lord, by his act, cannot alter the nature of the tenure, nor of the service which the tenant ought to do.'

"It was contended in argument, that the alteration from fulling-mills to corn-mills might be injurious to the grantor, because he might have corn-mills himself, the proximity of others to which might injure him ; and the principle was denied, that a man may preserve an easement by rebuilding on the same spot, and in the same manner, unless the previous destruction had been caused by some act of God, as by tempest or lightning ; but it was resolved, 'that the prescription did extend to these new grist-mills, for it appears by the register, and also by Fitz. Nat. Brev., that if a man is to demand a grist-mill, fulling-mill, or any other mill, the writ shall be general, de uno molendino, without any addition of grist or fulling. 21 Ass. 23, agrees of a plaint in assize ; so that the mill is the substance and thing to be demanded, and the addition of grist or fulling are but to show the quality or nature of the mill ; and therefore, if the plaintiff had prescribed to have the said watercourse to his mill generally (as he well might), then the case would be without question that he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water as it was before ; and it should be intended that the grant to have the watercourse was before the building of the mills, for nobody would build a mill before he was sure to have water, and then the grant of a watercourse being generally to his mill, he may alter the quality of the mill at his pleasure as is aforesaid.'

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*Luttrell's Case.*

"So, if a man has estovers, either by grant or prescription, to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed; and although he builds a new chimney, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers on the part newly added,—the same law of conduits and water-pipes and the like.

"So, if a man has an old window to his hall and afterwards he converts the hall into a parlour, or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house; and although in this case the plaintiff has made a question, forasmuch as he has not prescribed generally, but particularly to his fulling-mills, yet forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only of the quality or name of the mill, and that without any prejudice in the watercourse to the owner thereof, for these reasons it was resolved that the prescription remained." A further case is mentioned of a grant to a corporation, who were afterwards incorporated by another name; it was held, that they retained all their franchises and privileges, because no person would be prejudiced thereby (*m*).

*Saunders v.*  
*Newman.*

So, in *Saunders v. Newman* (*n*), where the claim in the declaration was for a mill generally, it was held, that the right to the discharge of the water was not lost by an alteration in the dimensions of the mill-wheel. "The owner of (a mill)," said Abbott, J., in that case, "is not bound to use the water in the same precise manner or to apply it to the same mill; if he were, that would stop all improvements in machinery; if, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different."

*Thomas v.*  
*Thomas.*

In *Thomas v. Thomas* (*o*), the action was brought for a disturb-

(*m*) [Cf. *Hazendale v. McMurray* (1867), L. R. 2 Ch. 790.]

(*n*) (1818), 1 B. & A. 258; 19 R. R. 312; ante, p. 253.

(*o*) (1835), 2 C. M. & R. 34; 1 Gale, 61; 41 R. R. 678. [Acc. *Harvey v. Walters* (1872), L. R. 8 C. P. 162.]

ance of the easement of eaves-droppings; and it appeared that the height of the wall, and the projection of the thatch from which the water fell, had been increased within five or six years before the action was brought. The defendants had built up a wall on their own premises, so as to prevent the water falling from the thatch at all. The jury found for the plaintiff, and the Court refused to disturb the verdict; but the point appears to have been very slightly urged, and consequently but little considered by the Court.

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*Thomas v.  
Thomas.*

So, in the case of *Hall v. Swift* (*p*), where the plaintiff had a right to water flowing from the defendant's land across a lane to his own land, and it appeared that, "formerly, the stream meandered a little down the lane before it flowed into the plaintiff's land, and that, in the year 1835, the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises"; and this, it was contended, negatived the right claimed in the declaration. Tindal, C. J., in his judgment, said: "If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment,—the making straight a crooked bank or foot-path would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself" (*q*).

*Hall v. Swift.*

[Commenting upon the decisions above quoted, the author observed that] it was directly admitted in many of the cases, and in none was it denied, that the right of the owner of the dominant tenement to make alterations in the mode of his enjoyment was, in all cases, subject to the condition, that no additional restriction or burthen be thereby imposed on the servient heritage; and that although, where the amount of excess could be ascertained and separated, as in the case of *Estovers* (*r*), such excess alone was bad, and the original right would nevertheless remain, yet, in those cases where the original and excessive uses were so blended together that it would be impossible, or even difficult, to separate them, and to impede the one without, at the

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(*p*) (1838), 6 Scott, 167; 4 Bing. N. C. 381; 44 R. R. 728. a natural right, not an easement.]

(*q*) [This, however, was a case of an alteration in the mode of enjoyment of (*r*) *Luttrell's Case* (1738), 4 Rep. 86, a; above, p. 534.]

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same time, affecting the enjoyment of the other, the right to enjoy the easement at all appeared to be lost, so long as the dominant tenement remained in its altered form. It was admitted by the Court of King's Bench, in the case of *Garritt v. Sharp* (s), that "the mode of enjoying an easement might be so changed as to defeat the right altogether"; and it would seem, on principle, that this consequence should ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed.

Where  
original and  
usurped  
rights cannot  
be separated.

If, [he argued,] such increased enjoyment would clearly narrow the servient owner's original right of building or otherwise acting on his own property, his tenure was damnified; for though, in strictness of law, he might still build, provided he did not injure the original easement, he could now do so only under the condition of being subject to the opinion of a jury, on a question so nice as that, whether the building in question, clearly injurious as it would be to the usurped right, was or was not so to the original right. The difficulty of this question would be increased in proportion to the magnitude of the alteration, and the lapse of time since it was made; consequently, in point of fact, in every case of negative easement, where no action is maintainable for the simple enjoyment, the servient owner would be compelled to submit to almost any usurpation, as in very few instances could he safely exercise his right of obstruction.

Burthen of  
proof lies on  
dominant  
owner.

[The author] further observed, that as all easements are restrictions upon the natural rights of property, in every case of conflict between the interest of the owners of the dominant and servient tenements, the liberty of the latter is more favourably regarded by the law than the attempts of the former to limit it; and therefore, even supposing the dominant owner to retain his right of action for what would have been a disturbance of the original easement, it would be incumbent on him to show, in order to maintain his action, that the obstruction to the usurped was clearly an interference with such original right; and also, if this were made out, it should seem he should further show that the usurped portion was capable of being obstructed without disturbing the original easement.

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(s) (1835), 3 A. & E. 325; 4 Nev. & M. 834.

The judgment of the Court of King's Bench in *Blanchard v. Bridges* [was, he said,] in accordance with these positions; but it seemed difficult to reconcile these principles with some of the earlier *Nisi Prius* decisions. In *Cotterell v. Griffiths* (*t*), where the right was to have light through windows impeded by blinds sloping upwards admitting light only, but giving no view, it would be almost impossible for the owner of the adjoining land to restrict the passage of air to the original amount when the blinds had been removed. To the case of *Chandler v. Thompson* (*u*), the same observations applied: in this latter case, if the house were not built to the extreme edge of the dominant tenement, it must be physically impossible to obstruct the light passing through the increased portion without at the same time darkening the original aperture. In the case of a watercourse this difficulty of fact could rarely occur; but there, as in the other instances mentioned in *Luttrell's Case*, the fact of any prejudice thereby arising to the servient heritage would be equally fatal to the validity of the easement in its altered form (*x*).

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[The author's views were supported, after the publication of this treatise, in several reported decisions (*y*), but in others they were criticised or dissented from (*z*), and by the decision in *Tapling v. Jones* (*a*) it was settled that these views were erroneous, that case having decided that an easement of light once acquired may not be obstructed on the ground that it is sought to obstruct only some increased enjoyment of the easement, if it is not possible to obstruct the increased enjoyment without at the same time obstructing the easement already acquired.

*Jones v. Tapling* (*b*) was an action for obstructing the lights of No. 107, Wood Street, Cheapside, in the city of London. The plaintiff had, in 1857, made alterations in 107, Wood Street, to adapt it to his adjoining new warehouses, by lowering the first and second floors, and lowering two out of three ancient windows in them so as to suit the new position of the floors. One of the

*Tapling v. Jones.*

(*t*) (1801), 4 Esp. 69; ante, p. 530.

(*u*) (1811), 3 Camp. 80; ante, p. 530.

(*x*) [See *Caukwell v. Russell* (1856), 26 L. J. Exch. 34, acc.].

(*y*) *Renshaw v. Bean* (1852), 18 Q. B. 112; *Caukwell v. Russell* (1856), 26 L. J. Exch. 34; *Davies v. Marshall* (1861), 1 Dr. & Sm. 557; 7 Jur. N. S. 720; *Turner v. Spooner* (1861), 4 L. T. N. S. 732; *Hutchinson v. Copestake* (1860), 8

C. B. N. S. 102.

(*z*) *Wilson v. Townend* (1860), 2 Giff. 324; 6 Jur. N. S. 1109; *Cooper v. Hubbard* (1860), 30 Beav. 160; 7 Jur. N. S. 457; *Hutchinson v. Copestake*, on app., 9 C. B. N. S. 863.

(*a*) (1861-5), 11 H. L. C. 290.

(*b*) (1861-5), 11 C. B. N. S. 283; 12 C. B. N. S. 826; 11 H. L. C. 290, nom. *Tapling v. Jones*.

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[lowered windows was about one foot longer than before, and the other was about the same size as the old one; and both occupied parts of the old apertures. He had also built two additional stories, with windows in each, these windows being so situated that it was impossible for the adjoining owner to obstruct them without also obstructing to an equal or greater extent that portion of the first-mentioned windows and lights which occupied the site of the ancient windows in No. 107. The defendant, who was tenant of the adjoining property, built a warehouse upon it, with a wall of such a height as to obstruct the whole of the windows of 107, Wood Street. After the defendant's wall was completed, the plaintiff caused his altered windows to be restored to their original state as to size and position, and the new windows to be blocked up by filling up the spaces with brickwork, and called on the defendant to pull down his wall, and restore the plaintiff's premises to their former light and air.

In the Court of Common Pleas opinions were equally divided; but Keating, J., the junior judge, having withdrawn his judgment, judgment was entered for the plaintiff. All the judges were of opinion that the original obstruction by the defendant was lawful; but the prevailing opinion (Erle, C. J., and Williams, J.) was, that the continuance of the obstruction after the cause for it was withdrawn was unlawful. The act of the plaintiff, said Erle, C. J., showed an intention the reverse of abandoning any existing right; his intention was to obtain an increase. The right of obstructing the old window was limited to the necessity of obstructing the new one; and the defendant acted at his peril if he chose with such a limited right to be at great expense for a permanent structure.

This judgment was affirmed in the Exchequer Chamber, Bramwell, B., and Blackburn, J., holding that the original obstruction was unlawful, and dissenting from *Renshaw v. Bean*; Wightman, J., and Crompton, J., agreeing with the opinions of Erle, C. J., and Williams, J., in the Court below; and Pollock, C. B., and Martin, B., dissenting, on the ground that the original obstruction was lawful, and that the defendant was not bound to pull down his wall on the plaintiff restoring his windows to their original condition.

"It is quite true," said Mr. Justice Blackburn, in his masterly judgment, "that the opening of a new window looking into the grounds of another may not only annoy that neighbour, but may often affect the value of his property. I do not doubt that

[the marketable value of a villa, with a garden enclosed by trees, and secluded from public view, would be seriously affected if a fresh story were raised on a neighbouring house, so as to overtop the trees and expose the garden to the view of neighbours; but the law of England considers this no injury. No action lies against him who put up the new window; there is no equity to restrain him from doing so; he has done an act perfectly legal, though it may be annoying to his neighbour. But though, in opening a new window, he has done a lawful act, he does not thereby acquire any right against his neighbour. That neighbour may use his land just as before; if he does it so as to obstruct the unprivileged window, he, in his turn, does a lawful act, though it may be annoying to the owner of the unprivileged window. He does this, not in the exercise of any new right to obstruct that window, but in exercise of his former rights to use his property as before, though it may obstruct that unprivileged window. The motive for exercising the right may be a wish to obstruct the window; but his right is, to use his land as before, without any new restriction. I may seem pedantically punctilious in expressing this; but it seems to me that much of what I consider the fallacy in reasoning of those from whom I differ, consists in laying down as a premise that there is a right to obstruct the new window (which is true in the sense that it is not wrong to do acts otherwise lawful, though they have the effect of obstructing the window), and then reasoning upon it as if it were true in the sense that a fresh right was conferred, and therefore that act, not otherwise lawful, became excused if done in exercise of that right. It is also true that, at the end of twenty years, the new window will, if not obstructed in the interval, become itself privileged, and the owner of that window will have a right to restrict the owner of the land from using his land so as to obstruct the window thus by lapse of time become a privileged window. As, by the hypothesis, he could not during the interval use his land so as to obstruct this as yet unprivileged window, without at the same time obstructing the old one, there is no more extensive restriction imposed upon him by the new window becoming privileged than existed before the new window was opened; but there is a new title acquired to this restriction; and, as it is possible that the two windows may come into different hands, so that the owner of the land, if he wishes to buy up the rights to the lights, may be forced to bargain with two persons

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[instead of one, some inconvenience may arise from this; but it is remote and slight, and indeed it requires some ingenuity to discover that any inconvenience can arise from the double title to the same restriction. The real hardship upon the owners of adjoining land is in cases where privacy is of value; there, if an old privileged window of such size and extent as to be an annoyance is to be respected, it may deprive the owner of the land of the power of obstructing new windows of such size and extent as to destroy his privacy altogether, and not only annoy him, but, as I have already pointed out, seriously affect the value of his property. Still, though this is a great damnum, it is no injuria. No action lies for it; no injunction in equity can be obtained to prevent it.

“Now, the supposed plea, if good, must be supported on analogy to those which excuse a trespass to real property, on the ground that it was necessary for the purpose of abating a nuisance erected or maintained by the plaintiff, or an assault or imprisonment, as necessary to prevent the plaintiff committing a wrong, &c. In such a case, the plaintiff's right to the possession of his close, or to his personal liberty, is neither destroyed nor suspended; but the defendant is excused because the interference with that right was necessary to prevent an injury to himself by the plaintiff.

“‘The reason,’ says Blackstone (3 Comm. 6), speaking of the abatement of a nuisance, ‘why the law allows this private summary method of doing oneself justice, is, because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.’ This assumes that what is to be redressed in a summary way is an injury which might be redressed by the ordinary course of justice. It would be a strange anomaly if we were to say that we do not approve of the old-established doctrine that a mere invasion of privacy is no injury, and, though admitting that this doctrine is so well established that no Court can grant any redress, we were to support the defendant if he takes the law into his own hands, and excuse him if he interferes with a legal right of his neighbour's, provided it is done for the purpose of protecting his privacy. Would a plea be good, justifying a trespass on the plaintiff's land for the purpose of obstructing this new window, if it could not otherwise be done? Or, if the plaintiff happened to have a

[private right of way from his door, could the owner of the servient tenement justify obstructing this right of way, if a new light were thrown out above the door, and that new light could not be obstructed without obstructing the right of way? I suppose it will scarcely be said that such pleas would be good; indeed, Lord Campbell himself, in *Renshaw v. Bean*, confines the right to obstruct the new window to cases in which the party in doing so commits no trespass. But why should the defendant be excused from interfering with the right of the plaintiff to light to his window on the third floor by an act of the plaintiff which would not excuse or justify an interference with any other right of the plaintiff, such as his right to the exclusive possession of his own land, or his right of way, if he had it? It is true that the act of the plaintiff has been that of opening new windows, and the right of the plaintiff which is interfered with is in respect of an old window. So far there is something in common—'there are lights in both.' But, in every other respect, they are as distinct as any other rights, as will be seen from this supposed case. The fourth and fifth stories here might have been separate tenements at the time when the new windows were thrown out, and afterwards within the twenty years, have come into the same hand as the third floor. I take it that, if such had been the case, the defendant would have as much excuse for interfering with the third floor window to prevent the plaintiff from continuing and maintaining the new windows as he now has; but it would then have been too obvious for dispute, that the right infringed was a right wholly distinct from that which would at the end of the twenty years be acquired."

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*Tupling v.  
Jones.*

The same arguments are further developed by Baron Bramwell, who shows the impossibility of extending the doctrine to two adjoining houses belonging to different owners. The judges who decided *Blanchard v. Bridges* and *Renshaw v. Bean* did not intend, he says, to overrule *Chandler v. Thompson*.

This judgment was affirmed in the House of Lords.

The Lord Chancellor (Lord Westbury), after citing the third section of 2 & 3 Will. 4, c. 71, which enacts that, after twenty years' enjoyment of the access of light to a dwelling house, the right thereto shall be deemed absolute and indefeasible, observed that the right to light now depended upon positive enactment, and did not require, and therefore ought not to be rested on, any presumption of grant, or fiction of a licence having been obtained

Principle of  
loss of ease-  
ment by en-  
croachment.

*Tapling v.  
Jones.*

[from the adjoining proprietor. "The right is declared by the statute to be absolute and indefeasible: and it would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment. Moreover, the absolute and indefeasible right which is the creation of the statute is not subject to any condition or qualification, nor is it made liable to be affected or prejudiced by any attempt to retard the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated. . . . If my adjoining neighbour builds upon his land, and opens numerous windows which look over my gardens or my pleasure-grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. . . . The 'invasion of privacy by opening windows' is not treated by the law as a wrong for which any remedy is given." He could not accept the reasoning on which the decisions in *Renshaw v. Bean* and *Hutchinson v. Copestake* were founded. "Upon examining the judgments in those cases, it would be seen that the opening of the new windows is treated as a wrongful act done by the owner of the ancient lights, which occasions the loss of the old right he possessed; and the Court asks whether he can complain of the natural consequence of his own act. Thus two erroneous assumptions are involved in or underlie this reasoning: first, that the act of opening the new windows was a wrongful one; and secondly, that such wrongful act is sufficient in law to deprive the party of his right under the statute." His Lordship's opinion was, that the appellant's wall, so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal act from the beginning.

Lord Cranworth gave similar reasons for his judgment, and expressed his dissent from the reasoning in *Renshaw v. Bean*.

Lord Chelmsford said that he did not see that the appellant's case would be benefited if it were established, contrary to the express words of the statute, that the right to the enjoyment of light rested on the footing of a grant. He stated the law to be that the right acquired by user must necessarily be confined to the exact dimensions of the opening through which the access of light and air had been permitted. As to anything beyond, the parties possessed exactly the same relative rights which they had before. The owner of the privileged window did nothing unlawful

[if he enlarged it, or made a new window in a different situation. The adjoining owner was at liberty to build upon his own ground so as to obstruct the addition to the old window, or shut out the new one; but he did not acquire his former right of obstructing the old window, which he had lost by acquiescence, nor did the owner of the old window lose his absolute and indefeasible right to it, which he had gained by length of user. The right continued uninterruptedly until some unequivocal act of intentional abandonment was done by the person who had acquired it, which would remit the adjoining owner to the unrestricted use of his own premises. "It will, of course," he said, "be a question in each case whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases upon his own land; and, should the owner of the previously existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval. For a right once abandoned is abandoned for ever." But a person, by endeavouring to extend a right, could not manifest an intention to abandon it; he evinced his determination to retain it, and acquire something more. And the enlarging an ancient window would be no cause of forfeiture, because the act was not unlawful. He thought *Renshaw v. Bean* could not be supported.

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by encroachment.

*Tapling v.  
Jones.*

While the appeal in *Jones v. Tapling* was still pending, three cases were decided which illustrate the principle there discussed.

The first of these in chronological order was *Binckes v. Pash* (c). The plaintiff's windows on the ground floor had existed in their present state for more than twenty years before action brought; but he had, about ten years before the action, altered his windows on the first floor; and it was apparent that, at the distance of ten feet, no obstruction of the new part of the upper windows could have been effectual which did not also obstruct the old parts and the windows on the ground floor. The defendant erected a building which was a material obstruction to some of the ground floor windows, but no material obstruction to the altered windows; and this building was finished and roofed in. On action brought, the defendant contended that, by reason of the alteration of the upper windows, he had a right to obstruct

*Binckes v.  
Pash.*

Principle of  
loss of ease-  
ment by en-  
croachment.

*Binokes v.  
Pash.*

[every window the obstruction of which was necessary to reach the usurped light. But the Court, while admitting that this might be the effect of *Renshaw v. Bean*, supposing the defendant to have had an intention of reaching the usurped light, held that on the fact he had no such intention, and decided against him. The true mode of meeting the contention was, said Byles, J., "to distinguish between the absolute right to block the ancient window and the conditional right dependent on another enterprise which has not yet been undertaken by the defendant, and perhaps never will be."

*Weatherley  
v. Ross.*

The second of the cases referred to was *Weatherley v. Ross* (d), which was a suit to restrain an interference with five lights which were alleged to be ancient. But it appeared that one of the windows in question was new, that two others had been recently shifted, and that it was impossible to block up the new and altered windows without obstructing the remaining ones. Wood, V.-C., following and approving *Renshaw v. Bean*, which was not then overruled, held that the defendant's obstruction was lawful. But, upon the plaintiff's submitting to block up the new window and to restore the altered windows to their former state, the Vice-Chancellor granted an injunction to protect the ancient windows when so restored, and ordered the plaintiffs to pay the costs of the suit.

*Curriers' Co  
v. Corbett.*

The third case is *Curriers' Co. v. Corbett* (e), where a house which had been burnt down and rebuilt, with windows differing somewhat in shape from the ancient ones, was held not to have lost its right to light,—a decision which, although doubtless in accordance with *Tapling v. Jones*, would be difficult to reconcile with *Renshaw v. Bean*.

Easement of  
light not lost  
by enlarge-  
ment of  
window.

The decision of the House of Lords in *Tapling v. Jones*, which has been uniformly followed since it was given (f), has put an end to the doctrine that an easement of light may be lost by an alteration in the size of a window (at any rate unless the effect of

(d) (1862), 1 H. & M. 349.

(e) (1865), 2 Dr. & Sm. 355; see 11 Jur. N. S. 719.

(f) Cf. *Martin v. Headon* (1866), L. R. 2 Eq. 425, at p. 433; *Staight v. Burn* (1869), L. R. 5 Ch. 163; *Aynsley v. Glover* (1876), L. R. 10 Ch. 283; *Newson v. Pender* (1884), L. R. 27 Ch. Div. 43; *Scott v. Pape* (1880), L. R. 31 Ch. Div. 554; *Smith v. Baxter*, [1900] 2 Ch.

138. The decision in *Heath v. Bucknall* (1869), L. R. 8 Eq. 1, so far as it rests (if it rests at all) on the view that an alteration which would not disentitle a dominant owner from claiming damages for obstruction might nevertheless prevent him from obtaining an injunction, cannot be relied upon: see *Staight v. Burn*, ubi sup.

[the alteration is to decrease the size of the window), whether that doctrine be founded on abandonment or on forfeiture.

Principle of  
loss of ease-  
ment by en-  
croachment.

In *Colls v. Home and Colonial Stores, Ltd. (g)*, the conflicting authorities were examined, and it was laid down that in order to constitute an actionable obstruction of ancient light it is not enough that the light is less than before, but the obstruction must amount to an actionable nuisance.

*Colls' Case.*  
Effect of  
decrease in  
size of  
window.

It follows that, since the law has been settled by that decision, any *increase* in the size of an ancient window will not increase the burden on the servient tenement, but on the contrary such increase will be to the advantage of the servient tenement, in that any obstruction which would be a nuisance to the window with its increased capacity for admitting light, would, *a fortiori*, have been an obstruction to the ancient window in its original form.

The question which would now appear to arise for consideration is whether the easement will be lost by the alteration of an ancient window so as to *decrease* its size. Since the explosion of the doctrine that a right to light acquired by prescription confers the right to all the light passing through the window, and the establishment of the principle that the obstruction must be such a substantial interference with the access of the light as to amount to a nuisance, it is obvious that the position with regard to increasing the burden on the servient tenement is exactly the opposite to that which it would have been if the authorities to the effect that the right acquired was co-extensive with the enjoyment during the period of prescription had been accurate. Whereas under these authorities any *increase* in the size of an ancient window would impose an additional burden on the servient tenement, under the law as laid down by *Colls' Case* such an increase in size would have the opposite effect, and an increased burden on the servient tenement would result from a *decrease* in the size of the window.

It would seem clear that, after an alteration in an ancient window whereby its size was decreased, the dominant proprietor would not be entitled to prevent the erection of buildings which, though obstructing the altered window, would not, before the alteration, have caused an illegal obstruction within the rule laid down

(g) [1904] A. C. 179; above, p. 324.

Principle of  
loss of ease-  
ment by en-  
croachment.

Effect of de-  
crease in size  
of window.

*Ankerson v.*  
*Connelly.*

[in *Colls' Case*. This principle was applied in *Ankerson v. Connelly* (h).

In that case an easement of light had been acquired for the dominant tenement in respect of windows of small dimensions. The dominant tenement was very amply lighted by means of light other than that which came through the ancient windows. The dominant proprietor subsequently pulled down the dominant tenement and re-built in such a way as practically to exclude the whole of the light other than that coming through the ancient windows. The plaintiffs, owners of the servient tenement, erected an obstruction which prevented any access of light to the ancient windows, which obstruction the defendant, the owner of the dominant tenement, pulled down. The plaintiffs thereupon brought an action against him for a declaration that he was not entitled to any easement over the plaintiffs' land for light and air. The evidence showed that the effect of the re-building of the dominant tenement was to destroy at least three-fourths of the light it had originally enjoyed, so that, as altered, the obstruction erected by the plaintiffs would most materially interfere with the access of light to the ancient windows, whereas before the re-building it would not have caused such an interference as would, since the decision in *Colls' Case*, have justified an injunction. It was held that the effect of the re-building was to impose an increased burden on the servient tenement, and that, it being impossible to sever the original right from the increased burden, the easement was lost altogether. In the judgment of Sir Gorell Barnes, President, the following passage occurs:—"The result, therefore, is that before these alterations on the dominant tenement the erection which the plaintiffs put up would not have been a legal (i) interference with the rights to light of the dominant tenement; and although, as matters now stand, some light would in fact be cut off by blocking up the space which is left after the alterations which have been made by the defendant, the alterations cannot in fact affect the plaintiffs' rights, because they had that right before to block up to that extent. If once you determine the fact that the plaintiffs were entitled prior to these alterations to erect the obstruction to such a height as they did against the building in question, then, as they have done nothing beyond that which they were entitled to do, they could not now be enjoined

(h) [1906] 2 Ch. 554; [1907] 1 Ch. 678.

(i) Sic; qy. illegal.

[from doing it; and it follows almost logically and as a matter of course, if they have a right to block up this gap which is left and cannot be restrained from doing it, that what the defendant has in fact done is to give up and destroy all rights that he had, because after what he has done he cannot claim any right at all.]

Principle of loss of easement by encroachment.

*Ankerson v. Connelly.*

Alterations may be made, not only in the size or area of a window, but in its plane and inclination; and the question, whether an alteration of this latter kind would suffice to extinguish an easement of light, was not concluded by *Tapling v. Jones*, and has been much discussed. It is now settled that alterations of this kind stand on the same footing as alterations of size, and do not, unless they are of such a character as substantially to change the nature of the easement (*k*), amount to abandonment.

Alteration of plane of window.

Thus, in *National Provincial Plate Glass Company v. Prudential Assurance Company* (*l*), it appeared that a building belonging to the plaintiffs, and containing ancient lights on all the floors, had recently been pulled down and rebuilt; and that the old dormer window of three faces, which lighted the ground floor, had been converted into a skylight partially co-extensive with the old window, but of a different shape. The defendants having obstructed the access of light to this skylight, the plaintiffs brought their action. On the motion for an injunction until the hearing, Jessel, M. R., while refusing the interlocutory injunction on the ground that the obstruction was complete before action brought, expressed his opinion that the easement of light formerly belonging to the ground floor window had not been lost; for, although the plane or direction of the glass had been altered, the aperture remained substantially the same (*m*).

*National Provincial Plate Glass Co. v. Prudential Assurance Co.*

On the action coming on for trial, Fry, J., came to the same conclusion, and awarded damages for the obstruction of the ground floor window. "It is said that the access of light to the dwelling-house must be identical, and that the right claimed and the enjoyment which has existed must be of access of light through identical apertures. Now in its breadth that proposition is not

(*k*) See below, p. 554.

(*l*) (1877), L. R. 6 Ch. D. 757.

(*m*) His Lordship also thought that the windows in the upper floors, which had been set back about five feet eight inches, were no longer the same windows so as to retain their right to light;

but it appeared on the hearing that these windows were not affected by the defendant's building, and the case cannot therefore be regarded as a decision on this point. See and consider the cases next quoted.



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plane of  
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Assurance Co.*

[true, because the case of *Tapling v. Jones* has shown that you may destroy the identical aperture by taking away the surrounding lines of that aperture and yet leave your right to light intact. Furthermore, I find nothing whatever in the statute which refers expressly to a window or aperture. I find in the statute a reference to the access of light, and in my view the access of light might be described as being the freedom with which light may pass through a certain space over the servient tenement; and it appears to me that wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement (*n*). I come to that conclusion for this reason:—that you do not want a statute to give you a right of access in your own premises to light through your own aperture. The statute is wanted to assure your right in the space over the servient tenement.

“But then it is said that the cases have to a large extent proceeded upon the form and size of the aperture or window; and that is perfectly true, because of course the opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement. It is for that reason that in all the cases the Court has had regard to the aperture in the dominant tenement by means of which the space over the servient tenement has been useful to the dominant tenement.”

*Barnes v.  
Loach.*

To the same effect is *Barnes v. Loach* (*o*), where it appeared that, on the settlement of a question of boundary, a wall containing ancient windows had been set back, and windows had been made in the new wall of the same size and in the same relative positions as those in the old wall, but in a different plane; and, on a special case being stated, a Divisional Court (Cockburn, C. J., and Lopes, J.) held that the right to light remained.

It was held in the same case that the dominant owner had not, by erecting a wall and a window in it, outside and at an angle with an ancient window, lost the easement of light attached to the ancient window.

(*n*) Since *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179, expressions to this effect must not be taken literally, but must be taken to refer to

the right as defined by that decision; and see *Ambler v. Gordon*, [1905] 1 K. B. 417.

(*o*) (1879), L. R. 4 Q. B. D. 494.

[Again in *Bullers v. Dickinson* (*p*) it was shown that the plaintiff's premises stood on the site of an old toll-house which had projected obliquely into the street, and had enjoyed an easement of light for the windows on the ground floor; that the toll-house had recently been pulled down, the site of the projecting part being sold to the vestry of the parish for the purpose of widening the street, and the plaintiff's premises being forthwith erected on the remainder. The plaintiff's ground floor window, for which he claimed protection, was substantially on the same level as the old window; but it stood further back, and, of course, at a different angle to the street. On an action being brought to restrain an interference with the new window, the defendant objected that the plaintiff had lost or abandoned his right; but Kay, J., overruled the objection.

Principle of loss of easement by encroachment.

Alteration of plane of window.

*Bullers v. Dickinson.*

And in *Scott v. Pape* (*q*), the whole question as to the effect of an alteration in a building was fully considered, and the principle of *Tapling v. Jones* was carried considerably further.

*Scott v. Pape.*

The facts were that the plaintiff, who was the owner of a range of buildings abutting on a narrow lane, and having ancient lights looking into the lane, had pulled down his buildings within twenty years before action brought, and erected larger buildings on the site. The new buildings contained windows on all the floors. Many of these windows were not shown to correspond to any substantial extent with any part of the ancient lights; and as to these no relief was claimed. But parts of six windows on the first floor of the new building did occupy a large portion of the area formerly covered by three ancient lights; and for this portion of such area the plaintiff claimed the protection of the Court. It was a material element in the case that the plaintiff, in rebuilding, had slightly advanced his wall into the lane, the gain varying from a foot to three feet five inches.

Upon these facts, North, J., who heard the action, declined to infer abandonment, and granted an injunction "restraining the defendant from permitting to remain erected any wall, &c., so as to darken, injure, or obstruct any of the ancient lights of the plaintiff's premises, as the same were enjoyed by means of those portions of the windows on the first floor of the plaintiff's old buildings which had not been blocked up in the rebuilding of

(*p*) (1885), 29 Ch. D. 155.

(*q*) (1886), L. R. 31 Ch. Div. 554.

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loss of ease-  
ment by en-  
croachment.

[the plaintiff's premises." And an appeal from this judgment was dismissed.

Alteration of  
plan of  
window.

*Scott v. Pape.*

The Lords Justices rested their decision on the wording of the third section of the Prescription Act (*r*).

"After twenty years," said Cotton, L. J., "the person who owns a dwelling-house, if he has used and enjoyed light, gets an absolute right to what he has used and enjoyed; and, in my opinion, the quantum of his enjoyment is defined by, and must depend on, the area of his windows, and also on the distance they are from other buildings. He acquires, in consequence of the position of other buildings and the size of his window, a right under this section to the enjoyment of that particular light which has come to his building. 'The access and use of light' depends upon the number of pencils of light which come directly or by refraction into that window. . . . (*s*)

"What alteration, then, will deprive the plaintiff of his right,—this right which can be claimed only in respect of a dwelling-house, workshop, or other building? Will the alteration of the purpose or object for which the building is to be used, as the conversion of a workshop into a house, or of a house into a workshop, have this effect? It will not: that is definitely settled by the case of *Ecclesiastical Commissioners v. Kino* (*t*). The old building there was a church, and that which was to be built on the site of the church was a warehouse—an entire alteration of the purposes and of the character of the building. Then will moving back the plane of the wall deprive the plaintiff of his right? In my opinion, no. It is difficult to see how the mere fact of moving back can do so; and in fact there is authority against such a proposition. Then, if moving it back will not, will simply moving it forward have this effect? In my opinion, both the moving back and the moving forward may destroy the right, because the new building, when constructed, may, either by being substantially advanced or substantially set back, be so placed that the light which formerly went into the old windows will not go into the new. If a building is set back say 100 feet, it will not enjoy the same cone of light that was enjoyed before, but will have an entirely different cone; and it may be moved so far forward that it will not enjoy the same light as that enjoyed

(*r*) Above, p. 204.

(*s*) See note (*n*), p. 550.

(*t*) (1880), L. R. 14 Ch. Div. 213.

[by the old building. In my opinion, the question to be considered is this, whether the alteration is of such a nature as to preclude the plaintiff from alleging that he is using through the new aperture in the new wall the same cone of light, or a substantial part of that cone of light, which went to the old building. If that is established, although the right must be claimed in respect of a building, it may be claimed in respect of any building which is substantially enjoying a part or the whole of the light which went through the old aperture.”

Principle of  
loss of ease-  
ment by en-  
croachment.

Alteration of  
plane of  
window.

*Scott v. Pape.*

“The measure of the enjoyment,” said Lord Justice Bowen, developing the same principle, “and the measure of the right acquired are, not the windows and apertures themselves, which would involve a continuing structural identity of the windows, but the size and position of the windows, which necessarily limit and define the amount of light which arrives ultimately for the house’s use.” *Blanchard v. Bridges* (x), he added, was decided under the old law which rested on an actual or presumed grant; and, whatever might be the view entertained in that case, there was no need to apply it to a right which had now a statutory origin.

Lord Justice Fry added his opinion that the “access of light” referred to in the Prescription Act was, not access through the aperture or window, but access or freedom of passage over the servient tenement; and that the “right thereto,” which is by the statute rendered “absolute and indefeasible,” is a right to the same access and use of light to and for *any* dwelling-house, workshop, or other building. The Act, he said, was silent as to identity of aperture, as it was silent as to identity of building.

The above judgments are misleading in so far as they suggest that the right acquired under the Prescription Act is a right to the whole of “that particular light which has come to” a building (y). As has been already seen, since the decision in *Colls v. Home and Colonial Stores, Ltd.* (z), it is established that the right acquired is a right only to freedom from nuisance by obstruction.

With this qualification the decision in *Scott v. Pape* has put the law as to the effect upon an easement of light of an alteration in the dominant tenement, on a clear and definite

No loss by  
mere en-  
croachment.

(x) Above, p. 532.

(y) See per Lord Macnaghten, [1904]

A. C., at p. 189.

(z) [1904] A. C. 179; above, p. 324.

Principle of  
loss of ease-  
ment by en-  
croachment.

No loss by  
mere en-  
croachment.

No substan-  
tial corre-  
spondence.

Clear evidence  
required.

Restoration  
after en-  
croachment.

[footing; and it must now be taken that, if and so long as the dominant tenement continues to enjoy the same or some part of the same light formerly enjoyed, no abandonment will be inferred (a). "It seems to me that the question which has to be determined is, whether proof is necessary of identity of the window or aperture through which the light claimed has been admitted to the dominant building, or whether the true matter for investigation is the identity of the light which has been so admitted. . . . I think the real test is, as I said before, identity of light and not identity of aperture, or entrance for the light" (b).

But where the encroachment is such that none of the existing windows can be said substantially to correspond with an ancient window, even though part of the space occupied by each may be identical, no difficulty arises; and, as it cannot be proved that any window in respect of which a right had been acquired has been in fact obstructed, abandonment may be inferred (c). The case of *Hutchinson v. Copestake* (d), above quoted, may be referred to this principle, and, so interpreted, may stand even without *Renshaw v. Bean*. And to the same effect are *Heath v. Bucknall* (e), where the new windows did not cover more than one-fourth of the former area; and the opinions of the judges in *Newson v. Pender* (f), where the whole question was discussed.

In any case it is essential to the preservation of the right that the dominant owner, when effecting the alteration, should preserve clear and definite evidence of the size and position of the former windows (g).]

Upon the second question (h): "Whether a party [who has lost his rights by altering his tenement] is still at liberty to restore his tenement to its former condition and recur to his former enjoyment," there is no express authority in the English law, [except the case of *Ankerson v. Connelly*, referred to above at page 548. In

(a) *Greenwood v. Hornsey* (1886), L. R. 33 Ch. D. 471; *Smith v. Baxter*, [1900] 2 Ch. 138; *Andrews v. Waite*, [1907] 2 Ch. 500; cf. *Roper v. Fortescue*, W. N. 1886, p. 78; *In re London, Tilbury, and Southend Rail. Co. and Trustees of Gower's Walk Schools* (1889), L. R. 24 Q. B. Div. 826.

(b) *Andrews v. Waite*, [1907] 2 Ch. 500; per Neville, J., at p. 509.

(c) *Pendarves v. Monro*, [1892] 1 Ch.

611; cf. *Ankerson v. Connelly*, [1906] 2 Ch. 544; [1907] 1 Ch. 678.

(d) (1861), 9 C. B. N. S. 863.

(e) (1869), L. R. 8 Eq. 1.

(f) (1884), L. R. 27 Ch. Div. 43.

(g) *Fowlers v. Walker* (1881), 49 L. J. Ch. 598; 51 L. J. Ch. 443; *Scott v. Pape*, ubi supra; *Pendarves v. Monro*, [1892] 1 Ch. 611.

(h) [Above, p. 528.]

[that case, as has been shown, it was sought to impose an additional burden on the servient tenement by building on the dominant tenement so as to exclude practically all the light formerly enjoyed by it other than that received through the ancient windows, thereby rendering any obstruction to the ancient windows more momentous. As has already appeared, it was held that such an increased burden could not lawfully be imposed upon the servient tenement, and that the right to light was lost altogether.

Principle of loss of easement by encroachment.

Restoration after encroachment.

No question was expressly raised in that case as to the right of the dominant owner to revert to his former rights upon restoring his tenement to its original condition, but a declaration was made in general terms to the effect that he was not entitled to any easement; and it would seem on principle that the party so altering his tenement] would have no such right, as he would have clearly evinced an intention to relinquish his former mode of enjoyment (i); and in addition to the actual encroachment, the uncertainty caused by the attempted extension of the right would of itself impose a heavier burthen upon the owner of the servient tenement, if such return to the original right were permitted.

By the civil law, where a man had a right of way, and used it in a mode not warranted by the grant, although he committed a trespass on his neighbour, the right of way was not lost (h). But a roof could not be lowered so as to make the servitus stillicidii more burthensome (i).

Civil law.

(i) *Moore v. Rawson* (1824), 3 B. & Cr. 332; 5 D. & R. 234; 27 R. R. 375; *Garritt v. Sharp* (1835), 4 Nev. & M. 834; 3 A. & E. 325; [*South Metropolitan Cemetery Co. v. Eden* (1855), 16 C. B. 42; *Tapling v. Jones* (1862), 12 C. B. N. S. p. 864, per Pollock, C. B.; *Aynsley v. Glover* (1875), L. R. 10 Ch. 283].

(k) Is cui via vel actus debebatur, ut vehiculi certo genere uteretur, alio genere fuerit usus: videamus, ne amisit servitutem; et alia sit ejus conditio, qui amplius oneris, quam licuit, vexerit; magisque hic plus, quam aliud, egisse videatur—sicuti si latiore itinere unus esset, aut si plura jumenta egerit, quam licuit, aut aque admiscuerit aliam. Ideoque in omnibus istis quæstionibus servitus quidem non amittitur: non autem conceditur plus, quam pactum est, in servitute habere.—Dig. 8, 4, 11,

quem. serv. amit.

(l) Si antea ex tegula cassitaverit stillicidium, postea ex tabulato, vel ex alia materia, cassitare non potest.—Dig. 8, 2, 20, § 4, de serv. præd. urb.

Stillicidium, quoquo modo adquisitum sit, altius tolli potest; levior enim fit eo facto servitus—cum quod ex alto cadet lenius et interdum direptum, nec perveniet ad locum servientem—inferius demitti non potest, quia fit gravior servitus, id est, pro stillicidio flumen. Eadem causâ, retro duci potest stillicidium, quia in nostro magis incipiet cadere; produci non potest, ne in alio loco cadat stillicidium quam in quo posita servitus est; lenius facere poterimus, acrius non. Et omnino sciendum est—meliolem vicini conditionem fieri posse, deteriolem non posse: nisi aliquid nominatim, servitute imponenda, immutatum fuerit.—Ibid, § 5.

Mere non-user of discontinuous easements.

The easements hitherto spoken of are of the continuous class, that is to say, where the enjoyment either is or may be continuous without any farther act of man (*m*). It now remains to consider how intermittent easements, as rights of way or rights to draw water, may be lost.

There seems to be no doubt that easements of this nature may be lost by mere non-user, provided such cessation to enjoy be accompanied by the intention to relinquish the right; from the very nature, however, of the enjoyment, and from the circumstance that the cessation to enjoy may take place without any alteration in the dominant tenement, it must always be difficult to lay down any precise rule to determine when a cessation of user shall be taken to have the characteristics requisite to make it amount to an abandonment of the right.

In considering this part of the subject two questions appear to arise:—

1st. Supposing there to have been simply a cessation of user, has the law presented any fixed period to raise the presumption of a release or abandonment of the easement?

2ndly. If any such period be fixed, can a shorter period suffice, if there be clear evidence of intention to relinquish the right?

Co. Lit.

Lord Coke appears to have been of opinion, that when a title by prescription was once acquired, it could only be lost by non-user during a period equal to that required for its acquisition. "It is to be known that the title being once gained by prescription or custom cannot be lost by interruption of the possession for ten or twenty years" (*n*).

At this time the analogy to the statute of James I. had not been introduced into the law.

*Doe v. Hilder.* In *Doe v. Hilder* (*o*), Lord Tenterden, in delivering the judgment of the Court, said: "One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of such land; and if such right appear to have existed in ancient times, a long forbearance to exercise it, which

(*m*) Ante, p. 25.  
(*n*) Co. Lit. 114, b.

(*o*) (1819), 2 B. & A. 791; 21 R. R. 488.

must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right,—in the latter a release of it, is presumed.”

Cessation to  
enjoy dis-  
continuous  
easements.

Mr. Justice Littledale, in the case of *Moore v. Rawson* (*p*), though he did not cite the above authority, expressed an opinion in accordance with it, that easements of this character could only be lost by a cessation of enjoyment during twenty years; the learned judge distinguished between these easements and a right to light and air, principally on the ground that the former, as far as their acquisition by prescription was concerned, could only be acquired by enjoyment accompanied with the consent of the owner of the land, while the enjoyment of the latter required no such consent, and could only be interfered with by some obstruction.

*Moore v.  
Rawson.*

“According to the present rule of law, a man may acquire a right of way or a right of common (except, indeed, common appendant) upon the land of another by enjoyment: after twenty years’ adverse enjoyment, the law presumes a grant made before the user commenced by some person who had power to grant; but if the party who has acquired the right by grant, ceases for a long period of time to make use of the privilege granted to him, it may then be presumed he has released the right. It is said, however, that as he can only acquire the right by twenty years’ enjoyment, it ought not to be lost without disuse for the same period; and that, as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user to raise a presumption of release; and this reasoning, perhaps, may apply to a right of common or of way.”

In *Holmes v. Buckley* (*q*), where there had been a grant of a watercourse through two pieces of land, with a covenant by the grantor to cleanse the same, the Court decreed the party claiming the land under the grantor to cleanse the stream, although the grantee had cleansed it at his own expense during forty years.

*Holmes v.  
Buckley.*

The precise period requisite to extinguish a right of way, by mere non-user, does not appear to have been determined by any express decision of the English courts (*r*); but it is said to have

(*p*) (1824), 3 B. & C. 339; 27 R. R. 375.

(*q*) (1691), 1 Eq. Cas. Abr. 27; [there are some observations on this case, as bearing on the law of covenants running

with the land, in *Austerberry v. Corporation of Oldham* (1885), L. R. 29 Ch. Div. 750, at pp. 777, 782].

(*r*) [In *Bower v. Hill* (1835), 1 Bing. N. C. 555; 41 R. R. 630, Tindal, C. J.,



Cessation to  
enjoy  
discontinuous  
easements.

Must be an  
intention to  
relinquish  
right.

*Payne v.*  
*Shedden.*

*Reg. v.*  
*Chorley.*

been decided in an American case, "that a right of way is not lost by non-user for less than twenty years" (s).

The following cases elucidate the doctrine that a mere intermittence of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the acquisition of a right, does not amount to an abandonment.

In *Payne v. Shedden* (t), issue was taken upon a plea of right of way; and it appeared that, by agreement of the parties, the line and direction of the way used had been varied, and at certain periods wholly suspended. Patteson, J., was of opinion that the occasional substitution of another track might be considered as substantially the exercise of the old right and "evidence of the continued enjoyment of it," and that the suspension by agreement was not inconsistent with the right.

[In *The Queen v. Chorley* (u), the defendants were indicted for obstructing a public footway by driving carts in a lane through which there was a public footway. The lane was so narrow that carts could not pass without damage to persons on foot. The defence was that the defendants had a private right of way with carts, &c. to a malthouse, &c. situated in the lane, and that the public right of footway had been acquired subsequently to the private right, and was qualified by or subject to it (x); and the question was, whether the privilege was extinguished by the acquiescence of the owners in the user of the way by the public—a user which was inconsistent with its use as a cartway by the defendants.

The learned judge at the trial told the jury that nothing short of twenty years' user by the public, in a way inconsistent with the private user, would destroy the right. The Court, on making a rule

said, that an obstruction to a way of a permanent character, if acquiesced in for twenty years, would be evidence of a renunciation and abandonment of the right of way; cf. *Dreucett v. Sheard* (1836), 7 C. & P. 465; 48 R. R. 797. But in *Cook v. Mayor of Bath* (1868), L. R. 6 Eq. 177, Malins, V.-C., held that thirty years' non-user, without more, was insufficient to extinguish a right of way.]

(s) *Emerson v. Wiley*, 10 Pickering, R. 310. [Some of the American Courts have held that an easement, to be extinguished by disuse, must have been acquired by use; but there is no authority for this proposition in English

law. See also Angell on Watercourses, § 250 to § 252, and the observations of Joy, C. B., 1 Jones' Exch. Rep. (Ir.) 123.]

(t) (1834) 1 Moo. & Rob. 382. The defendant failed in establishing any right of way. See also *Hal- v. Oldroyd*, ante, p. 525; and *Carr v. Foster* (1812), 3 Q. B. 581; 61 R. R. 321.

(u) (1848), 12 Q. B. 515; 76 R. R. 330.

(x) See *Brownlow v. Tomlinson* (1840), 1 M. & Gr. 484; *Elwood v. Bullock* (1844), 6 Q. B. 383; 66 R. R. 429; *Morant v. Chamberlin* (1861), 6 H. & N. 541.

[absolute for a new trial for misdirection, after saying, that "if the learned judge had done no more than remark that a mere ceasing to use the private way, or a mere acquiescence in the interruption by the public, were relied on, it would be prudent not to rely on such mere cessation or acquiescence unless shown for twenty years, it would have been no misdirection," proceed as follows:—"As an express release of the easement would destroy it at any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without reference to time; for example, this being a right of way to the defendant's malthouse, and the mode of user by driving carts and waggons to an entrance from the lane into the malthouse yard, if the defendant had removed his malthouse, turned the premises to some other use, and walled up the entrance, and then for any considerable time acquiesced in the new use, we conceive the easement would have been clearly gone. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury" (y).

Must be an intention to relinquish right.

*Reg. v. Chorley.*

In *Ward v. Ward* (z), a right of way was held not to have been lost by mere non-user for a period much longer than twenty years, it being shown that the way was not used, because the owner had a more convenient mode of access through his own land. Alderson, B., said: "The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment; the non-user, therefore, must be the consequence of something adverse to the user."

*Ward v. Ward.*

In *Lovell v. Smith* (a), the owner of a right of way had, about thirty years before the action, agreed with the servient owner to use, in lieu of part of the old way, a new way over the servient owner's land, and therefore he discontinued to use the old way, and used the new. The Court held that the mere non-user of the old way and the user of the new one for more than twenty years,

*Lovell v. Smith.*

(y) The Court, it will be seen, expressed no distinct opinion on the point left open in *Stokoe v. Singers*, ante, p. 525; but in the latter case Lord Campbell said, that "*The Queen v. Chorley* is an authority that an abandonment is

effectual if communicated and acted on; it goes no further." See ante, p. 61, as to *Perry v. Fitzhove*.

(z) (1852), 7 Exch. 838; 86 R. R. 852.

(a) (1857), 3 C. B. N. S. 120.

Must be an intention to relinquish right.

[under such circumstances, furnished no evidence of an intention to abandon the old right.

*Cook v. Mayor of Bath.*

In *Cook v. Mayor of Bath* (b), there had formerly been a right of way through a back door, which had been closed for thirty years, and then opened and used for four years before the obstruction. Malins, V.-C., held that there had been no abandonment. He says: "It is always a question of fact, to be ascertained by the jury or the Court from the surrounding circumstances, whether the act amounts to an abandonment, or was intended as such. If in this case the defendants had commenced building before the door had been re-opened, I should have been of opinion that the plaintiff had, by allowing it to so remain closed, led them into incurring expense, and therefore could not prevent them acting on the impression that he intended to abandon his right."

*James v. Stevenson.*

In *James v. Stevenson* (c), it was held that mere non-user of some of the roads over which a right of way existed, where no occasion for user had arisen, coupled with the use by the servient owner of those parts of the roads for farm purposes, did not constitute abandonment: and to the same effect is *Cooke v. Ingram* (d).

*M. R. v. Gribble.*

In *Midland Railway Company v. Gribble* (e), where, on the intersection of land by a railway, a crossing had been provided for the purpose of communication between the severed parts, it was held that, on the alienation by the owner of the part on one side of the railway without reserving any right of way over it, the right to use the crossing was finally abandoned.

*Young v. Star Omnibus Co., Ltd.*

In *Young v. Star Omnibus Company, Ltd.* (f), the plaintiffs claimed, and were held entitled to, a right of way over a strip of land 10 feet wide in the occupation of the defendants. Some years prior to the commencement of the action the plaintiffs erected on their land a summer-house which projected over the strip of land to the extent of 2 feet 4 inches. The defendants having obstructed the way, this action was brought, and the defendants pleaded extinguishment or abandonment on the part of the plaintiffs. It was held that the erection of the summer-house was at best only a partial abandonment, and constituted no defence to the action.]

*Watercourse. Hall v. Swift.*

In *Hall v. Swift* (g), where it appeared that about forty years

(b) (1868), L. R. 6 Eq. 177.

(c) [1893] A. C. 162.

(d) [1893], 68 L. T. 671.

(e) [1895] 2 Ch. 827.

(f) (1902), 86 L. T. 41.

(g) (1838), 6 Scott, 167; 4 Bing. N. C.

381; 44 R. R. 728. See observations on this case by Patteson, J., in *Carr v. Foster* (1842), 3 Q. B. 586; 61 R. R. 321. [*Hall v. Swift* is, however, a case not of an easement, but of a natural right.]

[since a stream of water from natural causes ceased to flow in its accustomed course, and did not return to it until nineteen years before the action was brought, the Court held, that the right to the flow of water was not lost. "It is further objected," said Tindal, C. J., "that the right claimed has been lost by desuetude, the water having many years since discontinued to flow in its accustomed channel, and having only re-commenced flowing nineteen years ago. That interruption, however, may have been occasioned by the excessive dryness of seasons, or from some other cause over which the plaintiff had no control. But it would be too much to hold that the right is, therefore, gone; otherwise, I am at a loss to see why the intervention of a single dry season might not deprive a party of a right of this description, however long the course of enjoyment might be" (h).

Must be an intention to relinquish right.

*Hall v. Swift.*

In *Crossley v. Lightowler* (i), the plaintiffs were carpet manufacturers, and had carried on business on the banks of the river Hibble from 1840 to 1864. A supply of pure water was necessary for their business. The defendants claimed a right to foul the stream with the refuse of dye-works, which had been carried on before 1839, but had then been shut up and abandoned, and re-opened by the defendants in 1864. Wood, V.-C., said: "The question of abandonment, I quite concede to the counsel for the defendants, is a very nice one. On that a great number of authorities have been cited, which appear to me to come to this, that the mere non-user of a privilege or easement of this description is not in itself an abandonment that in any way concludes the claimant; but the non-user is evidence with reference to abandonment. The question of abandonment is a question of fact, that must be determined upon the whole of the circumstances of the case. . . . It has always been held to be of considerable importance that a person in possession of a certain right, and leaving the right wholly unused for a long period of time, and having given so far an encouragement to others to lay out their money on the assumption of that right not being used, should not be allowed at any period of time to resume his former right, to the damage and injury of those who themselves have acquired a right of user which the recurrence to this long-disused easement will interfere with."

*Crossley v. Lightowler.*

(h) Cf. *Hale v. Oldroyd* (1845), 14 M. & W. 789; 69 R. R. 824, above, p. 525.  
(i) (1866), L. R. 3 Eq. 279.

Must be an  
intention to  
relinquish  
right.

[On appeal (*k*), Lord Chelmsford, C., said: "The authorities upon the question of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long-continued suspension may render it necessary for the person claiming the right to show that some indication was given, during the period that he ceased to use the right, of his intention to preserve it. The question of abandonment of a right is one of intention to be decided on the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind. The case of *Reg. v. Chorley* (*l*) shows that time is not a necessary element in a question of abandonment, as it is in the case of the acquisition of a right." His Lordship, on the facts, held that, the ancient dye-works having been dismantled without any intention of erecting others, the right had been abandoned, and that the case put by Holroyd, J., in *Moore v. Rawson* (*m*) exactly applied.]

Civil law.

So, by the civil law, where a right of this kind was lost by the fountain drying up, it was held to revive as soon as the fountain burst forth again (*n*).

Non-user with  
disclaimer.

Where, however, there has not been a mere cessation to enjoy, but it has been accompanied by indications of an intention to abandon the right, as by a disclaimer, there is authority for saying that a shorter period will be sufficient to extinguish the right. Such direct evidence of intention appears to have been treated in the same manner as the similar indications afforded by a change in the status of the dominant tenement. Such non-user, accompanied by confessions that the party had no right, would at all events be strong evidence, and in effect almost conclusive, that he never had any such right.

*Norbury v. Meade.*

In *Norbury v. Meade and Others* (*o*), the Lord Chancellor said: "In the case of a right of way over the lands of other persons, being an easement belonging to lands, if the owner chooses to say 'I have no right of way over those lands,' that is disclaiming that

(*k*) (1867), L. R. 2 Ch. 478.

(*l*) (1848), 12 Q. B. 615; 76 R. R. 330.

(*m*) (1824), 27 R. R. 375; 3 B. & C. 332, 338; above, p. 523.

(*n*) Hi, qui ex fundo Sutirino aquam ducere soliti sunt, adierunt me, proposueruntque—aquam, qua per aliquot annos usi sunt, ex fonte, qui est in fundo Sutirino, ducere non potuisse, quod fons exaruisset; et postea ex eo fonte aquam

fluere cepisse; petieruntque (*a*) me—ut, quod jus non negligentia aut culpa sua amiserant, sed quia ducere non poterant, his restitueretur. Quorum mihi postulatio cum non iniqua visa sit, succurrendum his putavi. Itaque quod jus habuerunt tunc, cum primum ea aqua pervenire ad eos non potuit, id eis restituere placet.—Dig. 8, 3, 35, de serv. præd. rust.

(*o*) (1821), 3 Bligh, 241.

right of way ; and though the previous title might be shown, a subsequent release of the right might be presumed." Non-user with disclaimer.

In *Harvie v. Rogers* (*p*), where a public right of way was claimed in Scotland, Lord Eldon said : " It was contended in argument that, according to the law of Scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of trial. But it is quite impossible to maintain a position of that kind ; for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right by successive obstructions, although these obstructions might be resisted by persons exercising the right of way, unless they thought proper to go into a court of justice. I apprehend that cannot be the case. It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in."

*Harvie v. Rogers.*

It is evident this language cannot be taken literally, that no amount of non-user would be sufficient to defeat a right of way once fully established. The obvious meaning of Lord Eldon was, that where acts of interruption are proved as evidence that the right has ceased, the material inquiry must be, whether such acts of interruption were known and acquiesced in.

A most important question upon this point under the Prescription Act was suggested in the first edition, " Whether, in all cases where an easement is claimed by prescription, the user must possess all the qualities requisite to confer a title down to the very commencement of the suit ; and therefore, although the right may have clearly existed at an earlier period, it is destroyed by a subsequent user not possessing those essential qualities (*q*). " It has been already seen that, by the statute, the period of user to acquire an easement must be that immediately preceding the commencement of an action (*r*) ; and if the statute had been held to be obligatory in all cases upon parties to proceed under it, and to exclude the common law evidence of prescription, many ancient rights would have been lost by modes which at the common law would have been insufficient to produce that result, and which the legislature, in framing the statute, did not appear to contemplate.

Effect of Prescription Act.

(*p*) (1828), 3 Bligh, N. S. 447 ; 32 E. R. 121. [1907] 2 Ch. 516 ; *affd.* [1908] 1 Ch. 167, a case of light.

(*q*) See, e.g., *Hyman v. Van den Bergh*, (r) See ante, p. 205, note (*b*).

Effect of Prescription Act.

As, for example, where, within the period requisite to confer an easement, there has been a unity of possession of the dominant and servient tenements, no right under the statute can be acquired according to the cases cited, ante, p. 186, note (*m*); and supposing the right to be ancient, the incidental operation of the statute would have been, in such a case, to destroy it, if the party claiming were compelled to claim under the statute, but as the right may still be claimed as at common law (*q*), no such consequence would in fact ensue (*r*).

So, of any other failure of the requisite qualities of the user.

Another anomaly would also have arisen as to the mode of losing an easement, which would be different in the case of an easement claimed by express grant and by prescription. Thus, a right of way by express grant would not be determined by unity of possession, as it would have been if claimed by prescription.

This inconvenience has been obviated by considering this as an affirmative statute, which does not take away the common law (*s*); and a party may, therefore, allege and prove a prescriptive title in the same manner as if the statute had not passed (*q*). In the case of *Onley v. Gardiner* (*t*), where the defendant failed in proving a sufficient title under the statute in consequence of a unity of possession, the Court, after argument, in which it was held that such unity defeated the title under the statute, allowed the defendant to amend his plea by pleading a right of way by prescription generally; and in *Richards v. Fry* (*u*), where it was suggested in argument, that "If a party had a right three years ago, which he released, and then an action was brought against him for a trespass committed before the release, if he pleads according to the letter of the statute, *i.e.*, a user for thirty years before the commencement of the suit, he would be defeated, although the act in question was perfectly justifiable at the time," Patteson, J., observed, "He might not be able to avail himself of the statute, but he would have a defence at common law;"

*Onley v.  
Gardiner.*

*Richards v.  
Fry.*

(*q*) [But, *semble*, this must be taken subject to the qualification that if either of the statutory defences (*viz.*, (1) the consent or agreement mentioned in sects. 1, 2 or 3 of the Act, as the case may be, or (2) interruption within the period of twenty years next before action, as provided by sect. 4) is available to the alleged servient owner, the alleged dominant owner "cannot evade the Act by

setting up any mode of claim other than that conferred on him by the statute." See per Farwell, L. J., in *Hyman v. Faen den Bergh*, [1908] 1 Ch. 167, 176.]

(*r*) See *Lawson v. Langley* (1836), 4 A. & E. 898; 43 R. R. 513.

(*s*) Bacon, Abr. Stat. G.

(*t*) (1838), 4 M. & W. 496.

(*u*) (1838), 3 Nev. & P. 72; 7 A. & E. 698; 45 R. R. 816.

[and the law has since been laid down accordingly in several cases (x).]

By the civil law, the same period was fixed for the loss of a prædial servitude by non-user, as for its original acquisition by enjoyment—ten years where both parties were present, twenty when either were absent—and, until this full period has elapsed, the servitude, though, owing to some alteration in the dominant tenement, it has ceased to exist for a series of years, might at any time revive by the two tenements being restored to their original relative position: thus, a right of way, interrupted by alienation of a portion of the dominant tenement, revived upon its re-purchase (y); so, too, the servitude “*altus non tollendi*” revived, if the intervening buildings were pulled down.

Civil law.  
Loss of  
servitude by  
cessation of  
enjoyment.

To lose an urban servitude, as already seen, some act of the owner of the servient tenement was also required. Where the servitude was only to be used at fixed intervals, exceeding a day, the periods of prescription for the loss by non-user were prolonged to twenty and forty years. Any user within that time, however, in the right of the dominant tenement, whether by the owner, occupier, or their friends, servants, or guests, was sufficient to preserve the servitude (z).

(x) See above, p. 199.

(y) Si quis ex fundo, cui viam vicinus deberet, vendidisset locum proximum servienti fundo, non imposita servitute; et intra legitimum tempus, quo servitutes pereunt, rursus eum locum adquisisset, habiturus est servitutem, quam vicinus debuisset.—Dig. 8, 6, 13, quem. serv. amit.

(z) Sicut usumfructum, qui non utendo per biennium in soli rebus, per annale autem (tempus) in mobilibus vel re moventibus diminuebatur, non passi sumus huiusmodi sustinere compendiosum interitum, sed ei decennii vel viginti annorum dedimus spatium: ita in cæteris servitutibus obtinendum esse censuimus, ut omnes servitutes non utendo amittantur, non biennio, (quia tantummodo soli rebus annexæ sunt,) sed decennio contra præsentem, vel viginti spatium annorum contra absentes: ut sit in omnibus huiusmodi rebus causa similis, explosis differentiis.—Cod. 3, 34, 13, de serv. et aq.

Si sic constituta sit aqua, ‘ut vel æstate ducatur tantum, vel uno mense,’ quaeritur, quemadmodum non utendo amittatur: quia non est continuum tempus, quo cum uti non potest, non sit usus. Itaque et si alternis annis vel mensibus quis aquam habeat, duplicato

constituto tempore amittitur. Idem et de itinere custoditur: si vero ‘alternis diebus, aut die toto, aut tantum nocte,’ statuto legibus tempore amittitur: quia una servitus est. Nam et si alternis horis, vel una hora quotidie servitutem habeat, Servius scribit, perdere eum, non utendo, servitutem: quia id, quod habet, cottidianum sit.—Dig. 8, 6, 7, quem. serv. amit.

Postremo finitur (servitus) etiam non utendo—si videlicet nemo servitute usus sit, neque is cui debetur, neque possessor prædii dominantis amicusve aut hospes; cæterum ita si nemo usus sit servitute per constitutum continuum tempus, quod tempus est decem vel viginti annorum. Enimvero si servitutis usus continuum aut quotidianum tempus non habeat, fortè quia alternis annis aut mensibus constituta est, duplicato constituto tempore non utendo amittitur, id est adversus præsentem viginti annis, adversus absentes quadraginta. Idemque et in longioribus intervallis pro ratione et facultate utendi, statuendum, Quicumque vero aut nostro ut prædii nomine usus sit, possessor, mercenarius, hospes, amicus, colonus, fructuarius, retinebimus servitutem.—Vinnius, Comm. ad. Inst. Lib. 2, tit. 3, quibus modis serv. amittantur, § 6.



## Civil law.

Loss of  
servitude by  
cessation of  
enjoyment.

The period of twenty years was fixed as the limit, by a constitution of Justinian, for the loss, by non-user, of a right of way which was only to be exercised for one day, at intervals of five years (*uno tantummodo die per quinquennium*), great doubts having previously existed upon this point amongst jurists (*a*).

The period for losing by non-user, as well as that for acquiring servitude by enjoyment, might be made up from the time of the occupation or ownership of successive persons—both the acquisition and loss having respect to the tenement, and not to the person (*b*).

Excessive user  
of discontin-  
uous  
easement.

[In addition to the cessation of enjoyment as a means of losing a discontinuous easement there remains to be considered the question of the effect of excessive user, which corresponds to encroachment in the case of continuous easements (*c*).

The second question propounded above (*d*) for consideration does not arise in the case of discontinuous easements, the answer to the first question being in the affirmative.

Where en-  
croachment  
can be  
separated.

In the case of discontinuous easements] the previously existing right will not be affected by acts of usurpation; the extent of which may, in such cases, easily be ascertained. Thus, if a party having a right of footway were to use it, not only as such, but also as a horse or carriage way, though he might thereby become liable to an action for such trespass, he might nevertheless sustain an action for any disturbance of his footway. The right thus sought to be usurped would, in the mode of its enjoyment, be altogether distinct from the previous easement.

*Milner's Safe  
Co. v. G. N.  
& City Ry. Co.*

[In *Milner's Safe Co., Ltd. v. Great Northern & City Ry. Co.* (*e*), the question of the effect of excessive user arose in an action by the plaintiffs for a declaration that the defendant company was not entitled to use a certain passage as a thoroughfare for passengers to or from its station at Finsbury Pavement, and for an injunction to restrain the defendant company from so using, and inviting its passengers so to use, this passage. The passage in question was a common passage which ran to a street called West Street along the back of certain houses which had in 1832 passed under the will of a testator to various devisees, the will containing no express provisions as to any rights of way over the passage. The plaintiffs were owners of two of these houses, deriving title under one set of limitations in the will,

(*a*) Cod. 3, 34, 14, de serv. et. aq.

(*b*) Tempus, quo non est usus præcedens fundi dominus, cui servitus debetur, imputatur ei, qui (in) ejus loco successit.—Dig. 8, 6, 18, § 1, quem.

serv. amit.

(*c*) See above, p. 528.

(*d*) Page 528.

(*e*) [1907] 1 Ch. 208.

[and the defendant company was the owner of the site of two other of the houses, deriving title under another set of limitations in the will. The defendant company, having pulled down the two houses standing on their land, constructed in their place an underground railway station having one of its entrances opening into the passage. For nearly two years the defendant company had invited passengers desirous of going into or coming from West Street to pass along the passage instead of entering at the front of the station in Finsbury Pavement, and at all times in the day, and especially in the morning and evening, a large number of passengers so used the passage.

Where encroachment can be separated.

*Milner's Safe Co. v. G. N. & City Ry. Co.*

Kekewich, J., held that the right of way to be implied upon the disposition of the houses by the testator, as above mentioned, was one for domestic and ordinary business purposes only, and that the defendant company having made it impossible that the passage should be used for the purpose for which it was designed, its right was not under the present circumstances exerciseable at all.

In the judgment the following passage occurs: "It may be correct to say that the right is suspended, for I suppose it is presumably capable of being revived, but what I hold is that it is not under present circumstances exerciseable at all." No question was raised, however, as to the right of the defendant company to use the passage in accordance with the right of way which the Court held was proper to be implied in the circumstances, and the above observations of the learned judge were called forth upon a consideration of an argument put forward on behalf of the defendant company to the effect that the site of the two houses was still being used for business purposes, and that as the implied grant extended to business purposes the present user was within it. It seems clear that the learned judge was dealing rather with this contention, than with the true right of the defendant company under the implied right of way, and it is submitted that the decision cannot be considered as being opposed to the views expressed above.

In *Harris v. Flower & Sons (f)*, the excessive user by which it was attempted to impose an additional burden on the servient tenement consisted in the use of a right of way for obtaining access to buildings erected partly on the land to which the right of way was appurtenant and partly on other land. A claim was

*Harris v. Flower & Sons.*

(f) (1905), 91 L. T. 816; above, p. 499.

Where en-  
croachment  
can be  
separated.

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*Harris v.  
Flower & Sons.*

[put forward on behalf of the plaintiffs that the right of way had been abandoned, on the ground that, as it was practically impossible to separate the lawful from the excessive user, the right of way could not be used at all. This contention failed, however, the Court holding that there had been no abandonment, but that the user of the way for access to the buildings so far as they were situate upon land to which the right of way was not appurtenant was in excess of the rights of the defendants, and a declaration was made accordingly, with liberty to apply.]

## PART VI.

## OF THE DISTURBANCE OF EASEMENTS.

## CHAPTER I.

## WHAT AMOUNTS TO A DISTURBANCE.

THERE is a clear distinction as to the foundation of the right of action for a private nuisance, properly so called, and an action for the disturbance of an easement. No proof of any right, in addition to the ordinary right of property, is required in the case of the former. To maintain an action for a disturbance of an easement to receive air by a window, proof of the accessorial right must be given; but it is otherwise where an action is brought for corrupting the air, or establishing an offensive trade (a). Yet the incidents of the two classes of rights, as far as concerns the remedies for any infringement of them, are similar. "A man has no need to prescribe to do a thing which he may do of common right, as to distrain for rent, rent service, &c.; or if I would prescribe that, when a man builds a house so that from his house the water runs upon my land, I have been used to abate that which causes the water to run upon my land, this prescription is void, for by the common law I can do that as well" (b). In many cases an action may be founded on both these rights; thus in *Aldred's Case* (c), the plaintiff complained of the stoppage of his windows, and that the defendant had erected a wooden building, and kept hogs therein, by means of which his easement of light was obstructed, and his enjoyment of his messuage diminished by the smell of the hogs. Both injuries are called nuisances, and the same principles as to the nature of the remedies for them apply indiscriminately to both.

Distinction between right of action for a nuisance and for disturbance of an easement.

*Aldred's Case.*

(a) (1611), 9 Rep. 58 b.

14; *Tenant v. Goldwin* (1705), 1 Salkeld, 360.

(b) *Per Choke, J.*, 8 Edw. 4, 5, pl.

(c) (1611), 9 Rep. 57 b.

Must be some  
sensible dimi-  
nution of  
enjoyment.

ment that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement.

The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved.

Thus it is said, in *Aldred's Case*, "If A. makes a watercourse, running in a ditch from the river to his house, for his necessary use, if a glover sets up a lime-pit for calf-skins and sheep-skins, so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged, 13 Hen. 7, 26." (c).

"If a Chandler erects a melting-house, it is a common nuisance; but if a man is so tender-nosed that he cannot endure sea-coal, he ought to leave his house" (d).

"If a man set up a school so near my study, who am of the profession of the law, that the noise interrupts my studies, no action lies" (e).

Easement  
need not be  
totally  
obstructed.

But the ploughing up of land, over which a man had a right of way, is a nuisance to his right of way; for it is not so easy to him as it was before (f). In *James v. Hayward* (g), Jones, J., said, "If a private man hath a way over the land of J. S., by prescriptive grant, J. S. cannot make a gate across the way."

So, the driving of stakes into a watercourse, or otherwise diverting it, whereby I can no longer have sufficient water for my mill (h); even if the stream be choked up for want of cleansing (i), or by the roots of trees growing into it (k). [Or an action will

(c) [This and the following two cases are instances of nuisance (in the ordinary sense of the word) rather than of disturbance of easements.]

(d) Per Dodderidge, J., in *Jones v. Powell* (1628), Palmer, 538; [see the passage cited from the judgment of Knight Bruce, V.-C., ante, p. 452, and the instances of nuisances given, p. 453.]

(e) Com. Dig. Action on the Case for a Nuisance (C); [cf. *Harrison v. Good* (1871), L. R. 11 Eq. 338, a case of covenant.]

(f) 2 Roll. Abr. Nusans, G. pl. 1; [*Clifford v. Hoare* (1874), L. R. 9 C. P. 362. Cf. *Austin v. Scottish Widows'*

*Assurance Society* (1882), 8 L. R. Ir. 385; *Nicol v. Beaumont* (1884), 50 L. T. 112.]

(g) (1631), Sir W. Jones, 222. [Count by reversioner for fastening gate made across private way, held good after verdict; *Kidgill v. Moor* (1850), 9 C. B. 364; 82 R. R. 364; cf. *Andrews v. Paradise* (1725), 8 Mod. 318. As to narrowing a way, see *Hutton v. Hamboro* (1860), 2 F. & F. 218; *Pallin v. Deffel* (1891), 64 L. T. 134.]

(h) 2 Roll. ubi sup. pl. 8, 9.

(i) *Bower v. Hill* (1835), 1 Bing. N. C. 549; 41 R. R. 630.

(k) *Hall v. Swift* (1838), 6 Scott, 167; 4 Bing. N. C. 381; 44 R. R. 728.

lie] for affixing a small pipe, and thereby taking water from a larger one (*l*), or for diverting part of the water only (*m*), [or for opening a drain into a sewer made by another on my land under a reservation of right to make it for the purpose of carrying off his drainage (*n*).]

Easement  
need not be  
totally  
obstructed.

"Item," says Bracton, "si quis aliquid fecerit quominus ad fontem, &c., ire possit, vel haurire, vel de fonte aquæ non tantam aquam ducere vel haurire, tales cadere possunt in assisam" (*o*).

A case is mentioned by Mr. Starkie (*p*), of an action brought for the disturbance of a watercourse, where it appeared that the water, after being used for irrigation, was returned to the natural channel; and Wood, B., nonsuited the plaintiff. As, however, it was shown that a portion of the water was lost by irrigation and absorption, the Court of King's Bench is reported to have set aside the nonsuit.

To maintain an action for obstructing light, it is [not] sufficient Light. to show that the [light is less than] before; [there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before (*q*).

The question now is, simply, Does the obstruction amount to a nuisance? But in answering that question it is said that regard is to be had to the light left. The following passage appears in the speech of Lord Halsbury, L. C., in *Colls v. Home and Colonial Stores* (*r*):—"The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources as well as on the question of the proximity of the premises complained of." In *Kine v. Jolly* (*s*), Vaughan Williams, L. J., makes the following observations: "In applying that test

Whether  
light left to  
plaintiff to  
be taken  
into con-  
sideration.

(*l*) *Moore v. Dame Browne* (1572), Dyer, 319 b, pl. 17.

(*m*) *Anon.*, Dyer (1566), 248 b, pl. 80; see also *R. v. Tindall* (1837), 6 A. & E. 143; 45 R. R. 426.

(*n*) *Lee v. Stevenson* (1858), Ell. Bl. & Ell. 512.

(*o*) Bracton, Lib. 4, ff. 233.

(*p*) 2 Evid. 2nd ed. 9, 11, note. [The

question arising in such cases is stated above, p. 272, note.]

(*q*) *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 179. [See, as to the extent of the right to light which is acquired by enjoyment, above, p. 317 et seq.]

(*r*) [1904] A. C. 179, 194.

(*s*) [1905] 1 Ch. 480, 493.

Whether  
light left to  
plaintiff to be  
taken into  
consideration.

[to this particular case I am going to take into consideration the light coming from other sources than through the particular window in respect of which the obstruction is complained of in this action . . . . It seems to me that in *Colls v. Home and Colonial Stores, Ltd.*, the Law Lords came to the conclusion, not only that we might, but that we must, take into consideration the light coming from other sources." And Farwell, J., in *Higgins v. Betts* (t), says: "The dominant owner was never entitled either by prescription or under the Act to all the light that came through his windows. It was not enough to show that some light had been taken, but the question always was whether so much had been taken as to cause a nuisance. But for many years the tendency of the Courts had been to measure the nuisance by the amount taken from the light acquired, and not to consider whether the amount left was sufficient for the reasonable comfort of the house according to ordinary requirement. If a man had a house with unusually excellent lights, it was treated as a nuisance if he was deprived of a substantial part of it, even although a fair amount for ordinary purposes was left. It is in this respect that *Colls' Case* has to my mind readjusted the law. It is still, as it always has been, a question of nuisance or no nuisance; but the test of nuisance is not 'how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had?' but, 'how much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind?'"

It is conceived, however, that in considering the amount of light left, regard will be had to that light only to which an indefeasible right has been acquired. Assuming, for example, a room having windows in walls facing both east and west, the windows in either wall being amply sufficient to light the room without the assistance of the light coming through the windows in the other wall; assuming, also, the windows in the eastern wall to have enjoyed the access of light for more than twenty years, and those in the western wall to have been open for less than the statutory period. In such a case, in an action for obstruction to the ancient windows in the eastern wall, could regard be had to the light enjoyed

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(t) [1905] 2 Ch. 210, 215.

[through the windows in the western wall, of which the owner of the building would be liable to be deprived at any moment ?

Whether  
light left to  
plaintiff to be  
taken into  
consideration.

The answer to this question, it is submitted, should be in the negative, and the observations of Lord Lindley in *Colls v. Home and Colonial Stores (u)*, and Lord Atkinson in *Jolly v. Kine (w)*, support this view. It is difficult, however, to see how, in practice, the "light coming from other sources" can be regarded, if that light is to be only such as the dominant owner has acquired a right to. Such a qualification might, and probably would, involve questions of the rights of the plaintiff against third persons. Moreover, it is now settled that twenty years' enjoyment gives, under the Prescription Act, only an inchoate right which is liable to be defeated at any time before the institution of proceedings in which the right is brought into question (*x*). It would appear, therefore, that the only "light coming from other sources" to which regard could properly be had would be such light as the plaintiff has already established his right to by action, all other light involving rights not in question in the action, and possibly questions between the plaintiff and third persons, and, in the case of light to which his title depended upon the Prescription Act, being light of which he was liable to be deprived.

It is no answer to an action for disturbance of light that the plaintiff has himself slightly diminished the light (*y*); but it is otherwise if the result of the plaintiff's act is to render the burden on the servient tenement more onerous; as, for example, if the plaintiff, by altering his premises, so diminishes the light coming to them by means other than through the ancient windows as to cause an obstruction, which before the alteration would have been immaterial, to effect a substantial diminution in his light (*z*).]

Interference  
by plaintiff.

"If the boughs of your tree grow over my land, I may cut them off; but I cannot justify cutting them before they grow over my land, for fear they should grow over" (*a*).

No redress  
before injury.

"Whether the defendant may pull down the nuisance before the house is made, and so come to be a nuisance—I do much doubt of this,—here, it is only said, the plaintiff conatus fuit to edifie

(u) [1904] A. C. 178, 211.

(w) [1907] A. C. 1, 7.

(x) *Hyman v. Van den Bergh*, [1907] 2 Ch. 516; [1908] 1 Ch. 167.

(y) See *Arcedekne v. Kelt* (1858), 2 Giff. 683; *Staigt v. Burn* (1869), L. R.

5 Ch. 163; *Barnes v. Loach* (1879), L. R. 4 Q. B. D. 494.

(z) *Ankerson v. Connolly*, [1906] 2 Ch. 554; [1907] 1 Ch. 678.

(a) Per Croke, J., *Norris v. Baker* (1617), 1 Rolle, Rep. 394.



No redress  
before injury.

this house, and rear up the timber; the defendant hath no hurt by this, for he may afterwards leave off again—the defendant is not to pull this down for the intent only. If one comes upon his own land, and intends to come upon my land, upon this imagination I am not to lay hands upon him. I never saw in any book a justification for a conation, because he did not do it" (u).

Imminent  
danger of  
disturbance.

Although, generally, some injury must have been sustained before redress can be had, yet, if the necessary consequence of what has already been done will be an injury to an easement, it is not a condition precedent to the exercise of the remedy that actual damage shall have accrued. Thus, if a party intending to build a house, which will obstruct my ancient lights, erect fences of timber for the purpose of building, I have no right to pull them down: "cur nemo tenetur divinare. But, if a house be built, the eaves of which project over my land, I need not wait till any water actually fall from them, but may pull them down at once" (x).

Quia timet.

So, too, it was admitted, in *Jones v. Powell* (y), "that an action did not lie for the fear of a nuisance merely; but it is otherwise where there is apparent cause for the fear, and, therefore, metus et periculum: for if a man waits until infection comes, it is too late to bring the action" (z).

Mere threats, unaccompanied by any act, do not amount to a disturbance (a).

A similar rule existed in the civil law. If the work was completed, the natural consequence of which would be damage to the party complaining, he need not wait until such damage actually occurred (b).

(u) Per Coke, C. J., in S. C., 3 Bulstrode, 197, nom. *Morrice v. Baker*; see *Penruddock's Case* (1738), 5 Rep. 101.

(x) 2 Roll. Abr. 145, *Nusans*, U.; R. acc. *Fay v. Prentice* (1845), 1 C. B. 828; 68 R. R. 823. [See *Pickering v. Rudd* (1815), 16 R. R. 777; 4 Camp. 219; *Barker v. Green* (1824), 2 Bing. 317; *Sampson v. Hoddinott* (1857), 1 C. B. N. S. 590.]

(y) (1628), *Palmer*, 536.

(z) [*Attorney-General v. Birmingham Borough Council* (1858), 4 Kay & J. 528; *Pattison v. Gilford* (1874), L. R. 18 Eq. 259; *Siddons v. Short* (1877), L. R. 2 C. P. D. 572; *Lord Cowley v. Byas* (1877), L. R. 5 Ch. Div. 944; *Fletcher v. Bealey* (1885), L. R. 28 Ch. D. 688; *Phillips v. Thomas*

(1890), 62 L. T. 793; *Att.-Gen. v. Corporation of Manchester*, [1893] 2 Ch. 87. Damages are not recoverable for a fear that a nuisance will be continued: *Battishill v. Reed* (1856), 18 C. B. 696; *Simpson v. Savage* (1856), 1 C. B. N. S. 347.]

(a) *Earl of Shrewsbury's Case* (1738); 9 Rep. 46 b.

(b) *Hæc autem actio (aquæ pluvie arcendæ), locum habet in damno nondum facto, opere tamen jam facto; hoc est, de eo opere, ex quo damnum timetur, totiensque locum habet, quotiens manu facto opere agro aqua nocitura est. Id est, cum quis manu fecerit, quo aliter fuisset, quam naturâ solet.*—Dig. 39, 3, 1, 1, de aq. et aq. pl. arc.

An action lies as well for a disturbance of the secondary easements, without which the primary one cannot be enjoyed, as for a disturbance of the primary easement itself. Disturbance  
of secondary  
easements.

“Item,” says Bracton, “si quis ire ad fontem prohibetur, habet actionem, ‘Quare quis obstruxit;’ quia cui conceditur haustus, ei conceditur iter ad fontem et accessus” (c).

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(c) Lib. 4, ff. 233; [*Race v. Ward* (1857), 7 E. & B. 384; and see *Peter v. Daniel* (1848), 6 C. B. 568.]

## CHAPTER II.

## REMEDIES FOR DISTURBANCE.

THE remedies for any disturbance of an easement are of two kinds:—1. By act of the party aggrieved; and 2. By act of law.

SECT 1.—*Remedies by Act of the Party.*

Remedy by  
act of party.

Abatement.

“Nota, reader,” says Lord Coke, “there are two ways to redress a nuisance, one by action, and in that he shall recover damages, and have judgment—that the nuisance shall be removed, cast down or abated, as the case requires; or the party aggrieved may enter and abate the nuisance himself” (a).

Bracton says that the remedy by act of the party must be taken without delay.

“Ea vero quæ sic levata sunt ad nocumentum injuriosum, vel prostrata vel demolita, statim et recenter flagrante maleficio, sicut de aliis disseisinis, demoliri possunt, et prosterni, vel relevari et reparari, si querens ad hoc sufficiat; si autem non, recurrendum est ad eum qui jura tuetur, qui per tale breve remedium habebit” (b).

It was resolved by all the justices, “that a man aggrieved by a nuisance may enter upon the land of another and abate the nuisance, by the common law, without prescription, and trespass will not lie against him either for the entry or abatement” (c).

(a) *Baten's Case* (1738), 9 Rep. 54 b; *Perry v. Fitzhove* (1845), 8 Q. B. 775; 70 R. R. 626.

(b) Lib. 4, ff. 233; and vide ff. 233 b. [According to Blackstone, 3 Comm. 6, an abatement is lawful, because an immediate remedy is required; but the right to abate is not confined to pressing cases, except perhaps where the nuisance consists only in omission. See per Best,

J., in *Earl of Lonsdale v. Nelson* (1823), 26 R. R. 363; 2 B. & C. at p. 311. In *Lane v. Capsey*, [1891] 3 Ch. 411, where the party aggrieved had applied for a mandatory injunction and failed, it was held that he had not necessarily lost his right to abate.]

(c) *Brooke's Abridg. Nuisance*, f. 102 b, pl. 33.

"If a man make a ditch in his own land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch" (*d*). Remedy by  
act of party.  
Abatement.

"If a man erects upon his own soil anything which is a nuisance to my mill, house or land, I may remain (*estoier*) on my own soil and throw it down. And so I may enter on his soil and throw down the nuisance, and justify this in action of trespass" (*e*).

"If a nuisance be made to my freehold, I may enter on his land (who made it) and deject the nuisance."

"If a man stops my way to my common, and incloses the common, I may justify the dejection of the inclosure of the common or way."

"If a nuisance be made to my land in which I have an estate for years, I may still deject the nuisance" (*f*).

In an old case (*g*), it was decided, "That if water runs through the land of M., and he stops the water in his own close, so that it surrounds my land, I may enter on his close to remove the obstruction, and he shall not maintain an action."

J. S. erected a mill dam, part upon his own land and part upon the land adjoining; the owner of the land adjoining pulled down the portion of the dam standing upon his land, by which all the dam fell down, and the water ran out. All the Court held it was justifiable. "So, if one erects a wall partly upon his own lands and partly upon the land of his neighbour, and the neighbour pulls down the part of the wall upon his land, and therefore all the wall falls down, this is lawful" (*h*). *Wigford v. Gill.*

So, in *Rex v. Rosewell* (*i*), it is laid down, "If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down;" "and for this reason only, it is said, a small fine was set upon the defendant in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights." *Rex v. Rosewell.*

In *Raikes v. Townsend* (*k*), where the disturbance complained of was the obstruction of a rivulet, by means whereof the *Raikes v. Townsend.*

(*d*) 9 Edw. 4, 35.

(*e*) 2 Rolle, Abr. Nusans (S).

(*f*) Ibid, W.

(*g*) 8 Edw. 4, 5.

(*h*) *Wigford v. Gill* (1592), Cro. Eliz. 269.

(*i*) (1699), Salkeld, 459.

(*k*) 2 Smith, 9.

Remedy by  
act of party.

Abatement.

Previous  
request to  
abate.

Care in  
abating.

defendant's cattle could not obtain water so plentifully as before, and the defendant entered upon the soil of the plaintiff and abated the mill-dam; after judgment for the defendant, a motion was made to enter judgment for the plaintiff non obstante veredicto, which was overruled. The passages above cited from Rolle's Abr. were relied on as an authority for confining the right to abate to the cases of nuisance to a mill, house, or land. Lord Ellenborough, C. J., said, "These cases are only put as instances."

No previous demand is requisite (*l*), except where the [nuisance cannot be abated without trespassing on the servient tenement, and such tenement is in the actual occupation of the owner, so that an abatement without notice is likely to lead to a breach of the peace (*m*), or has passed into other hands since the erection. In the latter] case, without such demand, the abatement would not be lawful; for the new occupant was not liable to a quod permittat before request made (*n*). But the demand may be made either on the lessor or lessee, for the continuance is a nuisance by the lessee, against whom an action well lies (*o*).

The abatement may be made by the party in possession of the dominant tenement, although the nuisance existed previous to his entering on the possession of it (*p*).

In abating a private nuisance, a party is bound to use reasonable care that no more damage be done than is necessary for effecting his purpose (*q*) [without injury to third parties (*r*).]

But, in abating a public nuisance, it seems doubtful whether the same degree of caution is required (*s*). Thus, in *Lodie v. Arnold* (*t*), it is said: "That [the Court seem to agree that] when

(*l*) *Perry v. Fitzhove* (1846), 8 Q. B. 757; 70 R. R. 626; *Lemmon v. Webb*, [1895] A. C. 1. Distinguish *Burling v. Read* (1850), 11 Q. B. 904; 75 R. R. 662, where the defendant claimed a right to the soil. It is reasonable to give notice in every case; per James, L. J., in *Commissioners of Sewers v. Glassey* (1872), L. R. 7 Ch. at p. 464.

(*m*) *Davies v. Williams* (1851), 16 Q. B. 546; 83 R. R. 592; and *Lane v. Capsey*, [1891] 3 Ch. 411.

(*n*) *Penruddock's Case* (1738), 5 Rep. 101; [*Jones v. Williams* (1843), 11 M. & W. 178; 63 R. R. 564, in which an exception is made in cases of immediate danger.]

(*o*) *Brent v. Haddon* (1620), Cro. Jac. 555.

(*p*) *Ibid*.

(*q*) Com. Dig. Action on the Case for a Nuisance, D. 4; *Perry v. Fitzhove* (1846), 8 Q. B. 775; 70 R. R. 626; [*Greenslade v. Halliday* (1830), 6 Bing. 379; 53 R. R. 241; *Davies v. Williams* (1851), 19 Q. B. 556, per Cur.]

(*r*) *Roberts v. Rose* (1865), 3 H. & C. 162; L. R. 1 Ex. 82.

(*s*) In Comyns' Digest, it is stated, "That a man may justify pulling down a house with violence, whereby the materials are lost." The only authority cited for this position, [if taken to mean that such damage may be caused by unnecessary violence,] is the case of *Lodie v. Arnold*, which is an authority for it at all events only in the case of an abatement of a public nuisance.

(*t*) (1698), Salkeld, 458.

H. has a right to abate a public nuisance, he is not bound to do it orderly and with as little hurt in abating it as can be." In the case of *James v. Hayward* (u), the defendant might have opened the gate without cutting it down, yet the cutting was lawful; and the Court denied *Hill's Case* (x), that matter of aggravation need to be answered. It does not appear that the gate was fastened, but rather the contrary (y).

Remedy by  
act of party.

Abatement.

In the case of *Lodie v. Arnold*, it appears from the report, that the materials of the house pulled down rolled into the sea, but not that the defendant threw them there. In *James v. Hayward*, it is laid down, that "a (public) nuisance must be abated, in such a convenient manner as it can be; if a house be levied to the nuisance (of another), the whole house shall be abated; if a part, that part only shall be abated; but, as to the house, when the nuisance is abated, it is not lawful to destroy the materials, but they shall, after the abatement, remain to the owners of them, and to him who did the nuisance." [In *Rea v. Shevard* (z), it was held that goods wrongfully placed by the plaintiff on the defendant's land might lawfully be removed to and deposited on the plaintiff's own land; and an action of trespass was dismissed.]

Disposal of  
materials.

(u) (1631), Cro. Car. 184; Roll. Abr. Nusans, T.; Sir W. Jones, R. 221, S. C.

(x) (1595), Cro. El. 384.

(y) [The origin of the doubt above expressed, whether the same care is required in abating a public and a private nuisance, appears to be the extra-judicial opinion which, in the passage above cited, is attributed to the Court in *Lodie v. Arnold*. That opinion appears from the context to have been founded on *James v. Hayward*. But in *James v. Hayward* the question was not as to the manner of abating the nuisance, but whether the gate was a nuisance, and, if so, could be abated. The opening of the gate would not have abated the nuisance. The modern precedents of justification on the ground of the removal of a public nuisance, allege that no unnecessary damage was done by the defendant in the removal (see 3 Chit. on Pl. 6th ed. 1008); and in the *Mayor of Colchester v. Brooke* (1845), 7 Q. B. 339; 68 R. R.

458, the Court put the cases of private and public nuisances on the same footing with regard to the care to be used in removing them. In the latter case, and in *Dimes v. Petley* (1850), 15 Q. B. 283; 81 R. R. 573, it was held that an individual is not justified in abating a public nuisance, unless it does him a special injury; and in the case of a nuisance in a public highway, "he can only interfere with it as far as is necessary to exercise his right of passing along the highway . . . and cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience." In *Bateman v. Bluck* (1852), 18 Q. B. 876; 88 R. R. 813, Lord Campbell, C. J., goes so far as to say that he cannot justify unless "there was no way in which he could exercise his right without the removal."]

(z) (1837), 2 M. & W. 424; 46 R. R. 633.

SECT. 2.—*Remedies by Act of Law.*

Law and  
equity.

The remedy by act of law for the disturbance of an easement [was] either by action at law or by suit in equity.

Common Law  
Procedure  
Act, 1854.  
Lord Cairns'  
Act.

[By the provisions of the Common Law Procedure Act, 1854 (*a*), giving the common law courts power to issue injunctions and receive equitable defences, and by Lord Cairns' Act (*b*), giving the Court of Chancery power to award damages in addition to or in substitution for an injunction, approach was made towards giving concurrent jurisdiction to courts of law and equity. But there were still cases in which the plaintiff had to choose the proper court at his peril. The foundation of the common law jurisdiction was damages, and, if no actionable wrong had been committed, the plaintiff could not have relief at law; and so, if his right was an equitable right. The foundation of the equitable jurisdiction was the right to an injunction; and equity would not award damages when the injury was not substantial enough to warrant an injunction.

Judicature  
Acts.

By the Judicature Act, 1873 (*c*), the jurisdiction both of the High Court of Chancery and of the common law courts has been transferred to the High Court of Justice, which is to administer law and equity concurrently; and, when there is any conflict between the rules of equity and the common law, the rules of equity are to prevail. The High Court is further empowered to grant a mandamus or an injunction "in all cases in which it shall appear to the Court to be just or expedient that such order should be made." And under the Act of 1875 (*d*) new rules and forms of pleading are provided.

These Acts do away with the distinction between equity and law in disputes respecting easements, and supersede the old forms of proceeding. Equity has ceased to be a concurrent jurisdiction mitigating the rigour of the law, and has become a part or amendment of the law.

County Court  
jurisdiction.

By the County Courts Act, 1888 (*e*), as amended by the County Courts Act, 1903 (*f*), the County Courts have jurisdiction to try any action in which the title to an easement or licence comes in

(*a*) 17 & 18 Vict. c. 125, ss. 79, 83; repealed by 46 & 47 Vict. c. 49.

(*b*) 21 & 22 Vict. c. 27, s. 2; below, p. 608.

(*c*) 36 & 37 Vict. c. 66, ss. 16, 24, 25.

(*d*) 38 & 39 Vict. c. 77, s. 17.

(*e*) 51 & 52 Vict. c. 43, s. 60.

(*f*) 3 Edw. 7, c. 42, s. 3.

[question, "where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over or under which such easement or licence is claimed, shall exceed the sum of one hundred pounds by the year." Remedy by action at law.

When the defendant claimed an easement as one of the public, so that there was no alleged dominant tenement, it was held that the above section did not apply (*g*).

The Mayor's Court has jurisdiction to deal with cases, no matter what the amount involved may be, where the whole cause of action arises within the City of London. "The words 'cause of action' have been held from the earliest times to mean every fact which is material to be proved to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse" (*h*). Mayor's Court jurisdiction.

By the Mayor's Court Procedure Act, 1857 (*i*), "Where the debt or damage claimed in any action shall not exceed the sum of £50, no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants, shall dwell or carry on business within the City of London or the liberties thereof at the time of the action brought, or provided the defendant, or one of the defendants, shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action, either wholly or in part, arose therein."

By virtue of sect. 89 of the Judicature Act, 1873, the Mayor's Court (*k*) has power to grant injunctions and other relief, in cases within its jurisdiction, "in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

#### (a) *Parties to Actions (l).*

*Parties entitled to sue.*—As an easement is a benefit attached to the dominant tenement, the party in possession may sue for any interference with its enjoyment, even though such interference be of a temporary nature only. Who may sue.

(*g*) *Hawkins v. Rutter*, L. R. (1892), 1 Q. B. 668. Where the plaintiff recovered only forty shillings as damages for interfering with an easement, it was held that the action was properly brought in the High Court, and that he was entitled to costs: *Howard v. Sutcliffe*, [1895] 2 Q. B. 358.

(*h*) *Cooke v. Gill* (1873), L. R. 8 C. P. 107, at p. 116.

(*i*) 20 & 21 Vict. c. 157, s. 12.

(*k*) The Mayor's Court is an inferior Court: *Cox v. Mayor of London* (1867), L. R. 2 H. L. 239.

(*l*) [This and the following two parts of this section were grouped by the author under the title of "Remedy by Action at Law"; the fourth was headed "Remedy by Suit in Equity."]



Injury to  
reversion.

If such interference be of a permanent nature, and injurious to the inheritance, the reversioner may also have an action for the same disturbance (*m*).

[It has been held that] for a trespass on the land not of a continuous nature, even though committed expressly in the assertion of a right, the reversioner could not sue (*n*). The correctness of the decision in the last case appears to depend upon the question, whether the user during the continuance of the particular estate would be evidence against the reversion,—which the Court assumed it would not. But even admitting that enjoyment, shown to have commenced since the beginning of the particular estate, would confer no title as against the reversioner, even if he was aware of it—a point of considerable doubt (*o*),—it seems hardly possible to say that enjoyment during a long particular estate would not interpose difficulties to the reversioner in resisting the claim upon its determination. “The ground upon which a reversioner is allowed to bring his action for obstructions, apparently permanent, to light and other easements, which belong to the premises is, that, if acquiesced in, they would become evidence of a renunciation and abandonment” (*p*).

Year books.

[The action by a landlord for an injury to land in the possession of his tenant may be traced to very early times. There are several cases in the year books where such actions have been maintained, not only for a permanent damage or destruction of the land (*q*), but also for transient acts commencing and ending during the tenancy, but which occasioned loss to the landlord. Such acts are: ousting a tenant (*r*); menacing tenants at will, whereby they determined their tenancies (*s*); improperly setting up a court, and,

(*m*) Com. Dig. Action on the Case for a Nuisance, B.; *Jackson v. Peaked* (1813), 1 M. & S. 234; 14 R. R. 417; *Alston v. Scales* (1832), 9 Bing. 3; 35 R. R. 502. See also *Hopwood v. Scholfield* (1837), 2 Moo. & Rob. 34; *Tucker v. Newman* (1839), 11 A. & E. 40; *Fay v. Prentice* (1845), 1 C. B. 828; 68 R. R. 823; [*Kidgill v. Moor* (1850), 9 C. B. 364; 82 R. R. 364; *The Metropolitan Association v. Petch* (1858), 5 C. B. N. S. 504].

(*n*) *Baxter v. Taylor* (1832), 4 B. & Ad. 72; 38 R. R. 227.

(*o*) Vide *supra*, Part II. Chap. III., Sect. 2, p. 214.

(*p*) Per Cur. in *Bower v. Hill*. See also 1 Wms. Saund. 346 b, n.; 1 Notes to Saund. 525; and *Durham and Sunderland Rail. Co. v. Walker* (1842), 2 Q. B.

963; *Hopwood v. Scholfield* (1837), 2 M. & Rob. 34.

(*q*) As in 19 Hen. 6, 45, where land in the possession of a tenant at will was subverted by a stranger, and it was held that the tenant at will should have an action of trespass, because he could not have the profit of the land, and the landlord another action of trespass for the destruction of the land. Bro. Abr. Trespas. pl. 131; 2 Rol. Abr. 551, Trespas. N. pl. 3.

(*r*) 12 Hen. 6, 4.

(*s*) 9 Hen. 7, 7; 1 Rol. Abr. 108, pl. 21; Com. Dig. Action on the Case for Misfeasance, A. 6; cited by Holt, C. J., *Keeble v. Hickeringill* (1809), 11 East, 576; 11 R. R. 273, n.; *Bell v. Midland Rail. Co.* (1861), 10 C. B. N. S. 307.

[by frequent distresses on the tenants for not attending the court, impoverishing them so that they were unable to pay their rent (*t*); fouling water with the refuse of a lime-pit, in which the defendant steeped calves' skins and sheep skins, which caused the plaintiff's tenants to leave his houses (*u*); or, taking toll of a tenant who was exempt from toll (*x*).

Injury to  
reversion.

The rule laid down in Com. Dig., Action on the Case for a Nuisance, B., on the authority of *Bedingfield v. Onslow* (*y*), and *Jesser v. Gifford* (*z*), is, "If the nuisance is to the damage of the inheritance, he in the reversion shall have an action for it." The authorities relied on by the Court in *Bedingfield v. Onslow* were 19 Hen. 6, 45; 12 Hen. 6, 4; 2 Rol. Abr. 551; and *Love v. Piggott*, Cro. El. 55, which is, "It was said there are divers precedents, that if a lessee for years be sued in *Court-Christian* for tythes, he in the reversion may have a prohibition."

Comyns'  
Digest.

In *Thomlinson v. Brown* (*a*), an action was brought by a landlord against his tenant for stopping up the windows of the house. It was said that, as the nuisance to the house might be abated before the defendant's term expired, the plaintiff could not then maintain an action against his own lessee for stopping them up; but the Court were of opinion, that the plaintiff might then maintain an action for the injury to his inheritance by obstructing the ingress of light and air into the house, and that the action did as well lie against the defendant, his own lessee, as against any other person.

*Thomlinson v.*  
*Brown.*

*Jesser v. Gifford* (*b*) was an action by a reversioner for erecting a wall, whereby the plaintiff's lights were obstructed. Mr. Justice Ashton read the case of *Thomlinson v. Brown*, where Mr. Norton, in arrest of judgment, argued that a temporary nuisance cannot be an injury to the inheritance: it may be abated before the estate comes into possession; but Mr. Crowle, for the plaintiff, answered that it was a damage done to the inheritance, for if the reversioner wanted to sell his reversion, the obstruction would lessen the value; and the Court were of opinion that an action might be brought by the tenant in respect of his possession, and by the landlord in

*Jesser v.*  
*Gifford.*

(*t*) *Earl of Suffolk's Case*, 13 Hen. 4, 11; 1 Rol. Abr. 107, pl. 7; Com. Dig. Action on the Case for a Disturbance, A. 6; cited by Willes, J., *Bell v. Midland Rail. Co.*

(*u*) *Prior of Southwark's Case*, 13 Hen. 7, 26; cited by Wray, C. J.,

*Aldred's Case* (1611), 9 Rep. 59 a.

(*x*) 43 Edw. 3, 29; 2 Rol. Abr. 107, pl. 8.

(*y*) (1797), 3 Lev. 209.

(*z*) (1767), 4 Bur. 2141.

(*a*) (1755), Sayer, 214.

(*b*) (1767), 4 Bur. 2141.

Injury to  
reversion.

[respect of his inheritance, for the injury done to the value of it. Lord Mansfield: "That is decisive."

*Jackson v.  
Pesked.*

With these cases before them, the Court of Queen's Bench, in *Jackson v. Pesked* (c), arrested the judgment in an action by a reversioner for building on a wall in the possession of his tenant, because the declaration did not state wrongful acts which *permanently* injured the land, and would therefore be *necessarily* injurious to the reversion, nor allege as a fact that they were done to the damage of the plaintiff as reversioner, or that his reversion was lessened in value. The judgment implies that acts of permanent injury to land, as by the destruction of a part of it, are necessarily injurious to the reversion (d), but that the reversioner may sue for any other wrongful act which in fact diminishes the value of his estate.

*Shadwell v.  
Hutchinson.*

In *Shadwell v. Hutchinson* (e), an action was brought by a reversioner on the ground that the defendant had, before the action, commenced and continued a roof or cover to the obstruction of an ancient window; and Lord Tenterden held that the reversioner might maintain the action, because it was an injury to the right, and the effect of letting the obstruction stand might be that, from death of witnesses, the evidence of its erection might be lost, and so the injury *become permanent*. "The declaration must either state something which is necessarily an injury to the reversion, as the cutting down timber trees or the like; or if it state something else, which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured. When that which is stated *cannot* be injurious to the reversion, the allegation that the reversion is thereby injured will not help the plaintiff. Where it *must* be an injury to the reversion, that concluding allegation is unnecessary."

A second action was brought for the continuance of the obstruction (f), and the judgment in the former action was pleaded by the defendant as a bar. The Court held, that if the erection in the first instance, was an injury to the reversion, the continuance must be so likewise. The continuance of the obstruction would,

(c) (1813), 1 M. & S. 234; 14 R. R. 417.

(d) See *Alston v. Scales* (1832), 9 Bing. 3.

(e) (1829), Moo. & Malk. 350; 3 C. & P. 615; 36 R. R. 497.

(f) *Shadwell v. Hutchinson* (1831), 2 B. & Ad. 97; 36 R. R. 497.

[in fact, render the proof of the title more difficult at a future time, notwithstanding the former recovery. In these cases, as in *Thomlinson v. Brown* and *Jesser v. Gifford*, the plaintiff recovered for the injury to his right, and the diminution of the value of his estate by the past obstruction, and not because it was a permanent erection, which might continue when his reversion became an estate in possession. Lord Tenterden says, that the injury might become permanent, not that it was so. The recovery in the second action shows that the judgment in the first was given for the past obstruction, and not for its permanence.

Injury to  
reversion.

In *Baxter v. Taylor* (g) the plaintiff failed, because in the opinion of the Court, the trespass proved did not in fact injure the reversioner. Parke, J., states the law in the same terms as in *Jackson v. Pesked*; he says: "I am clearly of opinion that there was no injury to the plaintiff's reversionary interest; and to entitle him to maintain this action it was necessary for him to prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied with a claim of right, is not necessarily injurious to the reversionary estate." And in *Tucker v. Newman* (h), Patteson, J., says of *Baxter v. Taylor*: "The subject of complaint in that case was a single temporary act. The act was no injury in itself, but was complained of as done with intent to establish a right of way."

*Baxter v.  
Taylor.*

In *Dobson v. Blackmore* (i), the jury found that no damage had been done to the reversion. Lord Denman, delivering the judgment of the Court, says (k): "If, indeed, an obstruction of a public road appeared to be of a permanent nature in its construction, or professed either by notice affixed, or in any other way, to deny the public right, and so led to the opinion that no road was there, the value of the house might be lowered in public estimation, and pecuniary loss might follow, for which I will not say that an action would not lie."

*Dobson v.  
Blackmore.*

In *Kidgill v. Moor* (l), the action was for fastening a gate across a way on divers days before the commencement of the suit, and continuing it so fastened until the commencement of the suit, to the injury of the plaintiff's reversion; and after verdict for the plaintiff, the defendant moved to arrest the judgment, which the

*Kidgill v.  
Moor.*

(g) (1832), 4 B. & Ad. 72; 38 R. R. 227.

(h) (1839), 11 A. & E. 43.

(i) (1847), 9 Q. B. 991.

(k) Page 1004.

(l) (1850), 9 C. B. 364; 82 R. R. 364.

Injury to  
reversion.

[Court refused to do, because the acts complained of might have been injurious to the reversion. Although Maule, J., and Williams, J., speak of the injury as permanent, the record shows that the judgment was given for a grievance which ended at the commencement of the action.

*Mumford v.  
Oxford, &c.  
Rail. Co.*

In *Mumford v. Oxford, Worcester and Wolverhampton Rail. Co. (m)*, it was for the first time held, that to give a right of action to a reversioner, the injury must be of a permanent character. The action was for making hammering noises, to the great nuisance of the tenant and all persons being in the house, whereby he refused to remain, and the messuage became depreciated, and the plaintiffs were injured in their reversion. The judge at nisi prius left the case to the jury, with a direction favourable to the defendants, and the verdict was for the defendants. The decision of the Court, perhaps, amounts to no more than that, in the case before them, the reversion was not injured in fact.

*Simpson v.  
Savage.*

In *Simpson v. Savage (n)*, the action was for an injury to the reversion by carrying on the trade of an agricultural implement maker near to the plaintiff's houses, which produced a nuisance of noise and smoke, and his tenants gave notice to quit, but had not quitted; and it was proved that, in consequence, the plaintiff's houses would not realize as much rent as before. Lord Campbell, at the trial, ruled that there was a distinction between the smoke nuisance and the noise, and that there was evidence of an injury to the reversion by the smoke. The verdict was for the plaintiff, damages 40s. Leave was given to set it aside, and enter a nonsuit, if the Court should be of opinion that there was no injury to the reversion. The Court, after time taken to consider, made the rule for a nonsuit absolute. They say, "After considering the authorities, we are of opinion that since, in order to give a reversioner an action of this kind, there must be some act done to the injury of the inheritance, the necessity is involved of the injury being of a permanent character." "The case is not distinguishable from *Mumford v. Oxford, Worcester and Wolverhampton Rail. Co.*" "The real complaint by the reversioner is, that he fears that the defendant or some other occupier will continue to make fires, and cause smoke to issue from the

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(m) (1856), 1 H. & N. 34.

(n) (1856), 1 C. B. N. S. 347.

[chimney ; and if the reversion would sell for less, that is not on account of anything that has been done, but of the apprehension that something will be done at a future time." In this case, the question submitted to the Court was, whether the reversion had in fact been injured, and as there had been no loss of tenants, no reduction of rent, no sale or attempt to sell the reversion, and no proof that its value was diminished, the decision may be correct.

Injury to  
reversion.

*Simpson v.  
Savage.*

On a demurrer to a count for injury to the plaintiffs' reversionary interest in a house by the erection of a hoarding which obstructed its ancient lights (*o*), Williams, J., said, "If at the trial it appears that the thing complained of is of a mere transitory character, the jury will come to the conclusion that it is not such an injury as to entitle the plaintiffs to maintain the action. But it may be that this hoarding may have been kept up in denial of the plaintiffs' title to the windows in question ; in which case it might furnish a serious body of evidence against them, if ever their rights should come to be contested. In *Simpson v. Savage* (*p*), the Court thought that the making of fires and causing smoke to issue was not an act of a permanent nature, so as in itself to be an injury to the reversion. But there are abundant authorities to the effect that, though the thing complained of may not be of a permanent nature in the sense of lasting for years, yet it may be permanent in the sense of enuring as an injury to the reversion." "Here," said Willes, J., in the same case, "the thing complained of may be an injury to the reversion, as by affording evidence in denial of the right, and, therefore, we cannot say that the declaration is bad."

*Metropolitan  
Association v.  
Petch.*

In *Bell v. The Midland Rail. Co.* (*q*), the same judge laid down "that it is not necessary that there should be a permanent obstruction of the way in order to give a right of action ; it is enough if the act is calculated to abridge or interfere with the right. In *Kidgill v. Moor* (*r*), locking a gate across a way was held to be a sufficient obstruction to give the reversioner a right of action. It is enough if, for all substantial purposes, the obstruction is of a permanent character."

*Bell v.  
Midland  
Rail. Co.*

It is to be observed, that in *Baxter v. Taylor*, supra, Taunton and Parke, JJ. (*s*), held that the act complained of would not be

(*o*) *The Metropolitan Association v. Petch* (1858), 5 C. B. N. S. 504.  
(*p*) (1856), 1 C. B. N. S. 347 ; contrary to the ruling of Lord Campbell, C. J., at the trial.

(*q*) (1861), 10 C. B. N. S. 287.  
(*r*) (1850), 9 C. B. 364 ; 82 R. R. 364 ; above, p. 585.

(*s*) Parke, J., at p. 73 of the report.

Injury to  
reversion.

[evidence of right against the reversioner; and that neither in *Mumford v. Oxford, &c. Rail. Co.* nor in *Simpson v. Savage* was the act a disturbance of an easement (the onus of establishing which, if disputed, would be on the plaintiff), but an injury, not of a permanent kind, to a natural right. A natural right would *primâ facie* subsist after the determination of the term; and, unless the reversioner suffered the injurious acts to continue after the end of the term (*t*), they would not be likely to afford an obstacle, by way of evidence, to the maintenance of the right. For the evidence afforded by them might be rebutted by proof of the subsistence of the tenancy during the continuance of them (*u*); whereas in the case of the disturbance of an easement the proof of its existence is equally affected by acts of interference with the enjoyment of it, whether the dominant tenement has been under lease or not (*x*).]

Continuing  
disturbance.

If the disturbance be continued, a fresh action may be maintained from time to time by the persons filling the situation of tenant in possession or reversioner (*y*).

Parties liable  
to be sued.

*Parties liable to be sued.*]—The party creating the disturbance is liable to an action, whether he be the owner of the servient tenement or not (*z*).

Continuing  
disturbance.

For the continuance of a disturbance, each successive owner in occupation of the servient tenement is liable, though it may have been begun before his estate commenced (*a*).

Where, however, the party was not the original creator of the disturbance, a request must be made to remove it before any action is brought; but it is sufficient if such request is made to the party in possession, though he be only lessee (*b*).

(*t*) As to the effect of which, see *Palk v. Shinner* (1852), 18 Q. B. 575; 88 R. R. 703.

(*u*) See the notes upon this subject, ante, p. 216.

(*x*) See *Crump v. Lambert* (1867), L. R. 3 Eq. 409; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Mott v. Shoolbred* (1875), L. R. 20 Eq. 22; *Jones v. Chappell* (1875), ibid. 539. *Cooper v. Crabtree* (1881), L. R. 19 Ch. D. 193, where the reversioner failed, was a simple case of trespass.

(*y*) *Penruddock's Case* (1598), 5 Rep. 101; *Shadwell v. Hutchinson* (1831), 2 B. & Ad. 97; 36 R. R. 497; [4 C. & P. 333; *Battishill v. Reed* (1856), 18 C. B. 696; *Wilson v. Peto* (1821), 6 Moore, 47; *Darley Main Colliery Co. v. Mitchell*

(1886), L. R. 11 App. Cas. 127; *Crumbie v. Wallend Local Board*, [1891] 1 Q. B. 503. As to a joint action by several owners affected by one nuisance, see Ord. XVI. r. 1. As to the effect of the death of the plaintiff in an action for obstructing ancient lights, see *Jones v. Simes* (1890), L. R. 43 Ch. D. 607.]

(*z*) Com. Dig. Action on the Case for a Nuisance, B.; *Wetlor v. Dunk* (1864), 4 F. & F. 298; [*Thompson v. Gibson* (1841), 7 M. & W. 456. See *Matthews v. King* (1865), 3 H. & C. 910.]

(*a*) [See, as to executors, *Jenks v. Viscount Clifden*, [1897] 1 Ch. 694.]

(*b*) *Penruddock's Case* (1598), 5 Rep. 101; *Brent v. Haddon* (1620), Cro. Jac. 555. [A request to a former occupier while in possession will suffice; *Salmon*

If the owner of land on which a nuisance is created lets the land, an action for the continuance will lie, at the option of the party injured (c), either against the landlord (d) or the tenant (e).

Parties liable to be sued.  
Landlord and tenant.

But no such action lies against the landlord for any such act of his tenant done during the continuance of the tenancy (f) [unless it be done by the landlord's authority (g)]; and a declaration charging a defendant with the duty of cleansing drains merely "as owner and proprietor" is bad (h).

[And no such action lies against the landlord for an injury due to the dangerous condition of the premises if he has taken from the tenant a covenant to repair; for in such a case he does not authorize the continuance of the nuisance (i).

On the same principle, it seems to have been held that a tenant for years, occupying a house which was an obstruction to light, erected before his tenancy, was not liable to be sued for damages for its continuance; for he had no authority to abate it (k).

Indeed, in all cases, the defendant must be shown to be in some sense responsible for the continuance of the act complained of. And in a case (l) where an obstruction had been created by a stranger, and the defendants, the owners of the locus in quo, had given the plaintiff their permission to remove it, it was held that the defendants were not bound themselves to remove the obstruction even after request made.

Liability for act of stranger.

The further question, how far an owner who employs a contractor to perform work for him is liable for the consequences of the con-

Liability for acts of contractor.

v. Bensley (1825), Ry. & M. 189. There appears to be no recent authority in favour of the proposition in the text.]

(c) [I.e., if he be a stranger, and not the tenant or his licensee; *Robbins v. Jones* (1863), 15 C. B. N. S. 240.]

(d) *Christian Smith's Case* (1633), Sir W. Jones, 272; *Rosewell v. Prior* (1702), 2 Salk. 460; 1 Ld. Raym. 713; *R. v. Peddy* (1834), 1 A. & E. 822; 3 Nev. & Man. 627; 40 R. R. 444; [*Todd v. Flight* (1860), 9 C. B. N. S. 377, in which the previous authorities are reviewed; *Att.-Gen. v. Proprietors of Bradford Canal* (1866), L. R. 2 Eq. 71; and *Mason v. Shrewsbury and Hereford Rail. Co.* (1871), L. R. 6 Q. B. 685.]

(e) [*Broder v. Saillard* (1876), L. R. 2 Ch. D. 692. Cases of covenant stand on a different footing; see *Gaskin v. Balls* (1879), L. R. 13 Ch. Div. 324.]

(f) *Cheetham v. Hampson* (1791), 4 T. R. 318; 2 R. R. 397; [*Rich v. Basterfield* (1847), 4 C. B. 783; *Bishop v. Trustees of Bedford Charity* (1859), 1 E. & E. 697; *R. v. Peddy* (1834), 1 A. & E.

827; 40 R. R. 444, per Littledale, J.; *Preston v. Norfolk and Eastern Counties Rail. Cos.* (1858), 2 H. & N. 735; *Bartlett v. Baker* (1864), 3 H. & C. 153. As to a tenancy from year to year, see *Gandy v. Jubber* (1864), 5 B. & S. 78, 485; 9 B. & S. 15; *Bowen v. Anderson*, [1894] 1 Q. B. 164; cf. *Kieffer v. Le Séminaire de Québec*, [1903] A. C. 85, where it was held that under Canadian law the landlord was not liable.]

(g) *Harris v. James* (1876), 45 L. J. Q. B. 545; *Phillips v. Thomas* (1890), 62 L. T. 793.

(h) *Russell v. Shenton* (1842), 3 Q. B. 449; 61 R. R. 249.

(i) *Pretty v. Bickman* (1873), L. R. 8 C. P. 401; *Guinnell v. Eamer* (1875), L. R. 10 C. P. 658.

(k) *Ryppon v. Bowles* (1615), Cro. Jac. 373.

(l) *Sazby v. Manchester and Sheffield Rail. Co.* (1869), L. R. 4 C. P. 198; cf. *Daniels v. Potter* (1830), 4 O. & P. 262; 34 R. R. 793.



Parties liable  
to be sued.

Liability for  
acts of  
contractor.

Work  
unlawful.

Work lawful.

Work  
hazardous.

*Pickard v.  
Smith.*

[tractor's negligent or wrongful acts, has been much discussed in recent cases.

Where the work contracted to be done is itself unlawful, or necessarily involves the doing of some unlawful act, the employer is clearly liable (*m*).

Where the act contracted to be done is in itself lawful, and involves no special risk or duty which the employer has neglected, it is equally clear that the employer is not liable (*n*).

But where the work contracted to be done is hazardous to third persons, or is otherwise of such a nature as to cast a duty upon the person undertaking it, the employer is bound to see that proper and reasonable precautions are taken, and is liable for any omission in this respect. Nor is it sufficient that, by the contract between employer and contractor, it is stipulated that the precautions shall be taken by the contractor; the employer must also take care that the stipulation is carried out (*o*).

"Unquestionably," said Williams, J., in delivering the judgment of the Court in *Pickard v. Smith* (*p*), "no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. Now, in the present case, the defendant employed the coal-merchant to open the trap, in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal-merchant; the defendant, having thereby caused

(*m*) *Ellis v. Sheffield Gas Consumers' Co.* (1853), 2 E. & B. 767.

(*n*) *Quarman v. Burnett* (1840), 6 M. & W. 499; 55 R. B. 717; *Reddie v. London and North Western Rail. Co.* (1849), 4 Exch. 244; 80 R. R. 541; *Knight v. Fox* (1850), 5 Exch. 721; *Gayford v. Nicholls* (1854), 9 Exch. 702; *Kiddle v. Lovett* (1886), L. R. 16 Q. B.

D. 605.

(*o*) *Hole v. Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; *Gray v. Pullen* (1864), 5 B. & S. 970; 34 L. J. Q. B. 265; *Pickard v. Smith* (1861), 10 C. B. N. S. 470; *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392; *The Snark*, [1900] P. 105.

(*p*) (1861), 10 C. B. N. S. at p. 480.

[danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good sense or law.”

Parties liable  
to be sued.

Liability for  
acts of  
contractor.

In *Bower v. Peate* (q), where the defendant was held liable for the act of his contractor in letting down a house entitled to support, the rule was put even more strongly. “A man,” said Cockburn, C. J., “who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbours must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.”

*Bower v.*  
*Peate.*

The first part of the passage above quoted was, in *Hughes v. Percival* (r), objected to by Lord Blackburn as so broadly stated as to appear to conflict with *Quarman v. Burnett* (s). But the substance of the law is quite clear, and was in fact applied in *Hughes v. Percival* itself. There the defendant, having authorized a contractor to perform some building operations which involved a use of the party-wall between his premises and the plaintiff's, and a risk to the plaintiff's premises themselves, was held liable for damage caused to the plaintiff's premises in the course of the

*Hughes v.*  
*Percival.*

(q) (1876), L. R. 1 Q. B. D. at p. 326. The decision was approved by the House of Lords in *Dalton v. Angus* (1881), L. R. 6 A. C. 740, 791, 829.

(r) (1883), L. R. 8 App. Cas. at p. 447.

(s) (1840), 6 M. & W. 499; 55 R. R. 717.

Parties liable  
to be sued.

Liability for  
acts of  
contractor.

*Hughes v.  
Percival.*

[operations by workmen employed by the contractor. "The law," said Lord Fitzgerald, "has been verging somewhat in the direction of treating parties engaged in such an operation as the defendants as insurers of their neighbours or warranting them against injury. It has not, however, reached quite to that point. It does declare that, under such a state of circumstances, it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned; but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be culpa levissima" (t).

The decision in *Butler v. Hunter* (u), so far as it is in conflict with the recent decisions above referred to, must be held to be overruled (x).]

#### (b) *Forms of Action.*

Remedy by  
action at law.

Real actions  
abolished.

Trespass or  
case.

The ancient common law remedies by assize of nuisance, and the writ of quod permittat prosternere, had long fallen into disuse before they were abolished by the statute for the limitation of actions and suits (y).

The modern remedy at law for the disturbance of an easement [was generally by suing upon counts in the form of] case. Occasionally, the disturbance may be the consequence of a direct act of trespass; and [in such case] there appears to [have been] some room to doubt whether trespass [was] not the only form of action maintainable. There are, however, authorities from which it seems that in all cases of consequential injury resulting from a direct act, the party aggrieved [had] the option of suing either in trespass or in case (z).

(t) Cf. as to the liabilities of local authorities for the default of their contractors, *Smith v. West Derby Local Board* (1878), L. R. 3 C. P. D. 423; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Penny v. Wimbledon Urban District Council*, [1898] 2 Q. B. 212; [1899] 2 Q. B. 72; *Hill v. Tottenham Urban Council* (1899), 79 L. T. 495.

(u) (1862), 7 H. & N. 826.

(x) See per Lord Blackburn, L. R. 6 App. Cas. 829; 8 App. Cas. 447.

(y) 3 & 4 Will. 4, c. 27, s. 36. [The

rest of this dissertation as to the form of the action is now of little value, except so far as it may enable the reader, by reference to the authorities relating to the form of action, to ascertain what, on a given state of facts, is the nature of the cause of action. It is unnecessary now to elect between the forms of action, trespass and case.]

(z) See this subject fully discussed in *Harris v. Ryding* (1839), 5 M. & W. 72; 52 R. R. 632; see also *Fay v. Prentice* (1846), 1 C. B. 828; 68 R. R. 823;

[By the Common Law Procedure Act, 1852 (*a*), it was rendered unnecessary to mention in the writ of summons any form or cause of action. And there is now (*b*) only one form of action. Local venue is abolished (*c*).] Remedy by action at law.  
Forms of action abolished.

(*c*) *Pleadings* (*d*).

*The [Statement of Claim or] Declaration (e)—The Allegation of Title.*—Whenever a plaintiff claims more than he is entitled to of common right, he must allege in his [statement of claim or] declaration that he ought to have that which he demands (*f*). Allegation of title in the declaration or statement of claim.

In some early authorities a distinction is taken as to the mode of alleging title in actions against strangers and in actions against the terretenant of the servient tenement: in the former case it was admitted that a general allegation, "that he had and ought to have the right claimed," was sufficient; while in the latter case it was said, that a title by grant or prescription must be shown, it being an attempt to "put a charge upon" the defendant (*g*). [By subsequent decisions, it appears to have been held that in all actions for disturbance of an easement, whether the action be brought against the servient owner or a stranger, a general allegation of right is sufficient (*h*). But in a plea, where the defendant justifies the act complained of by virtue of an easement, the particular title upon which the defendant relies, whether by grant or prescription, or by aver under the statute, must be set out (*i*).] Whether general allegation sufficient.

"However, although the plaintiff is at liberty to declare upon

[*Pitts v. Gaince* (1701), Salk. 10; *Earl of Shrewsbury's Case* (1738), 9 Rep. 46 b; *Mikes v. Caly* (1796), 12 Mod. 382; *Wells v. Ody* (1836), 1 M. & W. 452; 46 R. R. 358. As this point is no longer of practical importance, the full statement of these cases is omitted.]

(*a*) 15 & 16 Vict. c. 76, s. 3; repealed by 46 & 47 Vict. c. 49.

(*b*) Rules of the Supreme Court, 1883, Ord. I. r. 1.

(*c*) Rules of the Supreme Court, 1883, Ord. XXXVI. r. 1.

(*d*) [The importance of such rules of pleading as peculiarly relate to easements has been diminished by the C. L. P. Act, 1852, and the Judicature Acts, and consequently it has been thought desirable largely to abridge this chapter.]

(*e*) Pleadings in the Mayor's Court are still referred to under the old descriptions.

(*f*) *Wyatt v. Harrison* (1832), 3 B. & Ad. 371; 37 R. R. 566; *Tebbutt v. Selby* (1837), 6 A. & E. 786; [*Laing v. Whaley* (1858), 3 H. & N. 675, 901.]

(*g*) *St. John v. Moody* (1687), 3 Keble, 528, S. C. 531; *Blockley v. Slater* (1693), 1 Lutw. fol. 119; *Winford v. Wollaston* (1797), 3 Levinz, 266. [Cf. *Bullard v. Harrison* (1815), 4 M. & S. 387; 16 R. R. 493.]

(*h*) *Sandys v. Trefusis* (1640), Cro. Car. 575; *Villers v. Ball* (1689), 1 Shower, 7; *Tenant v. Goldwin* (1705), 1 Salk. 360; S. C. 2 Ld. Raym. 1089; *Rider v. Smith* (1790), 3 T. R. 766; 2 Wms. Saund. 113 a, note; 2 Notes to Saund. 361; Com. Dig. Pleader (C. 39); see also *Trower v. Chadwick* (1836), 3 Scott, 699; 3 Bing. N. C. 334; 43 R. R. 659, Preface VI.

(*i*) See Com. Dig. Chimin, D. 2; 1 Wms. Saund. 346; 1 Notes to Saund. 624; *Bird v. Dickinson* (1701), 2 Lut. 1526; *Grimstead v. Marloué* (1792), 4 T. R. 717; 2 R. R. 512; *Bailey v. Appleyard* (1838), 8 A. & E. 167; 47 R. R. 537. As to sect. 5 of the Prescription Act, see above, p. 206.

Remedy by  
action at law.

Whether  
general  
allegation  
sufficient.

Pleading at  
present date.

Description of  
right.

his possession generally, yet if he undertakes to set out a title, and does it insufficiently, the declaration is bad" (i). If, however, the title, as stated on the face of the declaration, is good, it has been said that the plaintiff is not bound to prove the same title as he has set out in his declaration (k), "for the disturbance is the gist of the action, and the title is only inducement, and cannot be traversed." He must prove the same right (l), but he need not prove the same title (m).

[But under the system of pleading now in use it is conceived that in all actions for disturbance of an easement, whether the action be brought against the servient owner or a stranger, the plaintiff cannot safely allege his right generally, in reliance on the above authorities, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at common law, or under the Prescription Act (n); and in many cases it is advisable to plead, alternatively, a title by all three methods.]

As the right to an easement exists in respect of the dominant tenement, the [statement of claim or] declaration usually states the possession of the tenement by the plaintiff, and that by reason thereof he was entitled to the right for the disturbance of which the action is brought.

A plea under the statute must state the enjoyment to have been "as of right" [except in the case of lights] (o); and a plea omitting these words was held bad in arrest of judgment (p).

Such a plea [should] state the enjoyment to have been without interruption (q). Under a plea of forty years' user, according to the statute, evidence of what took place before that period is admissible as showing the state of things at the commencement of the forty years' enjoyment (r).

(i) 1 Wms. Saund. 346 a; 1 Notes to Saund. 625; *Dorne v. Cashford* (1698), 1 Salk. 363; *Crowther v. Oldfield* (1706), 2 Ld. Raym. 1230.

(k) 1 Wms. Saund. 346 a; 1 Notes to Saund. 625.

(l) *Frankum v. Lord Falmouth* (1835), 2 A. & F. 452; 2 Nev. & Man. 330.

(m) Buller, N. P. 76; *Ferrer v. Johnson* (1594), Cro. Eliz. 336. Proof of a larger easement than that alleged will support the declaration. *Duncan v. Louch* (1845), 6 Q. B. 914; 66 R. R. 592. [Pleadings are now so liberally amended under the provisions of the R. S. C. Ord. XXVIII. that this subject of variance has ceased to be of sufficient importance to warrant a further discussion of it in this work.]

(n) *Harris v. Jenkins* (1882), L. R. 22 Ch. D. 481; and see *Smith v. Baxter*, [1900] 2 Ch. 138, 146; *Hyman v. Van den Bergh*, [1907] 2 Ch. 516, 521; [1908] 1 Ch. 167, 169, 176; cf. *Spedding v. Fitzpatrick* (1888), L. R. 38 Ch. Div. 410; *Pledge v. Pomfret* (1905), 92 L. T. 560. But in the form given in Appendix C. to the Rules of the Supreme Court, 1885, the lights are referred to as "ancient" merely.

(o) Prescription Act, s. 5; above, p. 206.

(p) *Holford v. Hankinson* (1844), 5 Q. B. 584; and see above, p. 207, note (f).

(q) Per Patteson, J., in *Richards v. Fry* (1838), 3 Nev. & P. 67; 45 R. R. 816.

(r) *Lawson v. Langley* (1836), 4 A. & E. 890; 43 R. R. 513.

In pleading at common law a right to an easement by a modern lost grant, both the date and parties to the supposed instrument must [formerly] have been set out (*q*), [but under the modern practice this is no longer necessary (*r*)].

Remedy by action at law.  
Pleas at common law.

There appears to be no precedent for a plea of an easement arising from the disposition of the owner of two tenements; but it should seem that, as in the easements of necessity, the right must be pleaded as arising by implied grant from the joint owner at the time of severance. The plea might allege the joint ownership and subsequent conveyance to the defendant, and aver the apparent and continuous nature of the easement, and its existence at the period of severance.

Disposition of owner of two tenements.

The plea of an easement of necessity must, in like manner, allege the joint ownership at the time of the conveyance, and that the easement is essential to the full enjoyment of the principal thing conveyed or reserved (*s*).

Necessity.

The plaintiff [should] describe in his [statement of claim or] declaration the nature of the right, in the enjoyment of which he has been disturbed. Thus, in an action for the disturbance of a way, he [should] state the terminus a quo and ad quem, and the kind of way he claims, as a footway, &c. (*t*). But a precise local description, as by alleging the land to be in any particular place, is not requisite; [and it is not necessary, although it is convenient, to give the intervening closes (*u*).]

Local description.

In an action on the case for a disturbance, it [was held] sufficient to allege a disturbance generally, without showing the particular manner of the disturbance (*x*). "I decline to think," said Lord Ellenborough (*y*), "that the gravamen need not be described with any local certainty. A plaintiff in such an action may indeed make it necessary to prove the gravamen in a particular place, by giving it a specific local description, as by alleging the nuisance as standing and being in a certain place, particularly described; but in general such particularity is not necessary." "It is sufficient to describe the substance of the injury, in order

Allegation of breach of duty.

(*q*) *Hendy v. Stephenson* (1808), 10 East, 55; C. L. P. Act, 1852, ss. 49, 51.

(*r*) *Palmer v. Guadagni*, [1906] 2 Ch. 494.

(*s*) [*Proctor v. Hodgson* (1855), 10 Exch. 824; *Bullard v. Harrison* (1815), 4 M. & S. 387; 16 R. R. 493.]

(*t*) Vide Com. Dig. Action on the Case for a Disturbance, B. (1); *Chimin, D.* (2); [*Harris v. Jenkins* (1882), L. R. 22

Ch. D. 481.]

(*u*) [*Simpson v. Lewthwaite* (1832), 3 B. & Adol. 226; 37 R. R. 413; *Harris v. Jenkins* (1882), ubi sup.]

(*x*) Com. Dig. Action on the Case for a Disturbance, B. (1); *Anon.* (1566), 3 Leon. 13; *Dawney v. Dee* (1621), Cro. Jac. 604.

(*y*) *Mersey and Irwell Navigation v. Douglas* (1802), 2 East, 497.

Remedy by  
action at law.

to give the other party notice of what he is to defend." "It would have been sufficient," said Le Blanc, J., "to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened."

In the [more] recent case of *Tebbutt v. Selby*, Patteson, J., appears to have doubted whether such a general allegation of obstruction would be sufficient (z), and nowadays particulars would undoubtedly be ordered.

Action by  
reversioner.

In actions by the reversioner, he must show that he sues in that capacity, and allege that the disturbance is to the injury of his reversionary estate (a).

Pleas or  
defences.

*Of the [Defence or] Plea (b).*—Previous to the modification of the rules of pleading [in H. T., 4 Will. 4], the plea of the general issue in an action on the case, in addition to traversing the whole declaration, was sufficiently comprehensive to let in almost every possible defence. [But by a rule of pleading, T. T., 1853, r. 16, which was substantially the same as one of H. T., 4 Will. 4, it was provided that] the plea of not guilty in actions [for torts should] operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial [should] be admissible under that plea (c).

[And by the Rules of the Supreme Court, 1883, Ord. XIX. r. 13, "every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind, so found by inquisition."

Equitable  
defence.

Matters which in Chancery would entitle the defendant to an unconditional and perpetual injunction to restrain the action, are now available in the common law courts in answer to the action, and may be pleaded by way of equitable defence (d).]

Old form of  
reply.

*Of the [Reply or] Replication (b).*—[The difficulty of selecting the proper form of replication was removed by the Common Law

(s) (1837), 6 A. & E. 793. [In the form of declaration given by the Common Law Procedure Act, 1852, Sched. (B.), 30, the manner of the disturbance was stated; cf. Rules of the Supreme Court, 1883, App. C. (vi.), 12.]

(a) *Jackson v. Peaked* (1813), 1 M. & S. 234; 14 R. R. 417. [See above, p. 582.]

(b) See note (e), p. 593.

(c) *Frankum v. Lord Falmouth* (1835) 2 A. & E. 462; 2 Nev. & Man. 330; *Dukes v. Gosling* (1835), 1 Bing. N. C. 588; 1 Scott, 750. See *Trower v. Chadwick* (1836), 3 Scott, 699; S. C., 3 Bing. N. C. 334; 43 R. R. 659.

(d) See *Davies v. Marshall* (1861), 10 C. B. N. S. 697; Jud. Act, 1873, s. 24 (2).

[Procedure Act, 1852, which enabled the plaintiff to reply several matters,—to traverse generally, or, admitting part of the plea, to deny the rest, and to reply by joining issue with the effect of denying the substance of the plea. Remedy by  
action at law.

The replication by joinder of issue was a substitute for the old replication *de injuriâ*, and put in issue the same averments only. Thus, being replied, in an action of trespass, to a plea of prescriptive right, it was held not to put in issue the allegations that the acts complained of were done in the exercise of the right (*d*).

Under the Rules of the Supreme Court, 1883, a joinder of issue, not being by way of defence to a counterclaim, operates as a denial of every material allegation of facts in the pleading upon which issue is joined, other than such as are expressly excepted (*e*). Judicature  
Acts.

No reply may now be delivered unless the same be ordered (*f*), and if no reply is ordered, or if a reply is ordered and is not delivered within the period allowed for the purpose, the pleadings are closed, and all the material statements of fact in the defence are deemed to have been denied and put in issue (*g*).]

By the 5th section of the Prescription Act, already cited, “any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, shall be specially alleged and set forth.” Replication  
under Pre-  
scription Act.

Upon this clause it has been decided, in the case of *Tickle v. Brown* (*h*), that where a defendant justifies under an enjoyment of twenty or forty years, if the plaintiff relies upon a licence covering the whole of that period, he must reply such licence specially, but a licence granted and acted on during the period may be given in evidence under the general traverse of the enjoyment “during the period alleged, showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years.”

In *Beasley v. Clarke* (*i*), Tindal, C. J., said:—“Under a replication, denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and

(*d*) *Glover v. Dixon* (1853), 9 Exch. 158.

(*e*) Ord. XIX. r. 18.

(*f*) Ord. XXIII. r. 1.

(*g*) Ord. XXVII. r. 13.

(*h*) (1836), 4 A. & E. 369; 43 R. R. 358.

(*i*) (1836), 3 Scott, 258; 2 Bing. N. C. 705; 42 R. R. 704.



Justification  
under  
easement.  
Replication  
under Pre-  
scription Act.

without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section, 'not inconsistent with the simple fact of enjoyment,' being referable, as we understand the statute, to the fact of enjoyment as before stated in the Act, viz., an enjoyment claimed and exercised as of right."

In *Onley v. Gardiner* (k), the Court of Exchequer decided that unity of actual possession was inconsistent with the simple fact of enjoyment as of right, and, therefore, need not be specially pleaded. The simple fact of enjoyment, referred to in the 5th section, is an enjoyment as of right; and proof that there was an occasional unity of actual possession is as much in denial of that allegation as the occasionally asking permission would be; [because the enjoyment during the unity of possession could not be an enjoyment as of an easement.

The disabilities and exceptions mentioned in the 7th and 8th sections must be specially replied to a plea under the Act (l); so must the fact that the enjoyment was under a statutory right which ceased before the expiration of the required period of enjoyment (m), or that the servient owner and his agents were absent from the neighbourhood and ignorant of the enjoyment during the whole period (n), or, in short, any other facts which would rebut the inference of a right by prescription or grant. The 7th and 8th sections only apply to the affirmative easements included in the 2nd section, so that a replication under those sections to a plea claiming an easement of light by virtue of twenty years' enjoyment, would be bad.

Rejoinder  
under Pre-  
scription Act.

*Rejoinder.*—If to a plea of user for twenty years, or for forty years, a tenancy for life is replied, and there has been a user for the one or other of those periods named in the plea, in addition to the period of the tenancy, the defendant should rejoin that fact.

Although the plea alleged an enjoyment "next before the suit," such rejoinder would be good (o).

(k) (1838), 4 M. & W. 498; 51 R. R. 704.

(l) *Pye v. Mumford* (1848), 11 Q. B. 666; 75 R. R. 582.

(m) *Kinloch v. Nevile* (1840), 6 M. &

W. 795; 55 R. R. 784.

(n) See sect. 1 of the Act.

(o) *Clayton v. Corby* (1842), 2 Q. B. 813; 2 Gale & D. 182; 57 R. R. 807; *Pye v. Mumford* (1848), 11 Q. B. 666; 75 R. R. 582.

(d) *Remedy by Injunction.*

The remedy which was afforded at law, before the passing of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), for the continuous disturbance of easements or other nuisances, by an indefinite series of actions, was obviously, in many cases, quite [inadequate; and the Court of Chancery has always exercised, and the High Court of Justice still exercises, the power of interfering, by injunction, to stop the whole mischief complained of (*p*).]

Ground for interference of Courts of Equity.

The foundation of the plaintiff's right in such cases being a right at common law, the Court of Chancery, before finally granting equitable relief, at one time required that the legal right of the person seeking relief should be established in a proceeding at law (*q*). But that Court was by the Chancery Procedure Act, 1852 (*r*), empowered to determine the legal right itself. And now, by the Judicature Act, 1873 (*s*), the jurisdiction both of the Court of Chancery and of the common law courts is vested in the High Court of Justice, which has power to entertain legal and equitable claims and defences alike.

Trial at law formerly required.

Chancery Procedure Act, 1852.  
Judicature Act, 1873.

It was said that, if what is complained of be in its nature useful and necessary to the public, though productive of inconvenience to individuals, as a small-pox hospital, the Court will not interfere by injunction; and *Baines v. Baker* (*t*) was referred to. But in that case there does not appear to have been anything really amounting to a nuisance at all (*u*); and the judgment of the Vice-Chancellor Wood in *Attorney-General v. Birmingham Borough Council* (*x*), shows that, if a nuisance be proved in fact, it is immaterial whether the nuisance is committed for the benefit of a private individual or many (*y*).]

Public utility no answer.

(*p*) *Robinson v. Lord Byron* (1785), 1 Bro. C. C. 583 (watercourse); *Thorpe v. Brumfit* (1873), L. R. 8 Ch. 650 (way); *Arcedekne v. Kelk* (1858), 2 Giff. 683; *Herz v. Union Bank of London* (1858), *ibid.* 686, and *Wilson v. Townend* (1861), 30 L. J. Ch. 25 (light); *Hunt v. Peake* (1860), 1 Johns. 705 (natural right of support); *North-Eastern Railway v. Elliott* (1863), 10 H. L. C. 333 (easement of support).

(*q*) See judgments in *Imperial Gas Co. v. Broadbent* (1859), 7 H. L. C. 600. It never was a ground of demurrer that the legal right had not yet been tried,

though it was a ground for not granting an interlocutory injunction.

(*r*) 15 & 16 Vict. c. 86, s. 62; repealed by 46 & 47 Vict. c. 49.

(*s*) 36 & 37 Vict. c. 66, ss. 16, 24.

(*t*) (1752), Ambl. 153; 3 Atk. 760.

(*u*) See the comments of Vice-Chancellor Kindersley in *Soltau v. De Held* (1851), 2 Sim. N. S. atp. 148; 89 R. R. 245.

(*x*) (1858), 4 Kay & J. 528.

(*y*) See also *Att.-Gen. v. Luton* (1856), 2 Jur. N. S. 180; *Lillywhite v. Trimmer* (1867), 36 L. J. Ch. 525; *Att.-Gen. v. Coln-y Hatch Lunatic Asylum* (1868), L. R. 4 Ch. 146; *Att.-Gen. v. Gee* (1870),

Remedy by  
injunction.

Public  
nuisance may  
be restrained  
at suit of  
individual.

The mere fact that a nuisance is of a public nature will not in equity more than in law prevent individuals from applying to the Court for protection, if they sustain special damage thereby. "It is going too far," said Lord Eldon in *Crouder v. Tinkler* (z), "to say that, if a plain nuisance is attended with particular and special damage to an individual, producing irreparable damage, that individual shall not be at liberty to come here unless the Attorney-General chooses to accompany him." Thus, too, in the more recent case of *Spencer v. London and Birmingham Railway Co.* (a), it was held that, where individuals sustained injury from a public nuisance, quite distinct from that which was inflicted by it on the public, a bill might be filed by those individuals to be relieved from the nuisance (b).

Right by  
contract.

Where the right claimed is clearly shown to exist by contract, express or implied, and the contract can only be effectually enforced by injunction, a Court of Equity will interpose.

In *Martin v. Nutkin* (c), a bill was filed for an injunction against the churchwardens, &c. of Hammersmith "to stay the ringing of the five o'clock bell": the Court granted the injunction during the lives of the plaintiffs and the survivors of them, as it appeared that the defendants had agreed not to ring the five o'clock bell upon consideration that the plaintiff should build a cupola to the church, which he accordingly did, and the bell was silenced for two years, after which the annoyance complained of took place (d).

Injury must  
be substantial.

[Where the injury complained of is trifling, the Court will not, even at the present day, interfere by injunction.]

L. R. 10 Eq. 131; *Vernon v. Vestry of St. James, Westminster* (1879), L. R. 16 Ch. Div. 449; *Metropolitan Asylum District v. Hill* (1881), L. R. 6 App. Cas. 193; *Att.-Gen. v. Acton Local Board* (1882), L. R. 22 Ch. D. 221. Distinguish *Att.-Gen. v. Guardians of Poor of Union of Dorking* (1882), L. R. 20 Ch. Div. 595, where the nuisance existed before the commencement of the defendants' powers; and *London and Brighton Rail. Co. v. Truman* (1885), L. R. 11 App. Cas. 46, where the Railway Acts are treated as expressly authorizing a nuisance.

In *Att.-Gen. v. Corporation of Manchester*, [1893] 2 Ch. 87, it was suggested, but not decided, that on an application to restrain a public nuisance some weight might be given to this consideration; see above, p. 460; and see *Att.-Gen. v. Nottingham Corporation*,

[1904] 1 Ch. 673, at p. 681.

(z) (1816), 19 Ves. 621; 13 R. R. 267.

(a) (1836), 8 Sim. 193; 42 R. R. 159.

(b) Vide etiam *Mayor of London v. Bolt* (1799), 5 Ves. 129; *Sampson v. Smith* (1838), 8 Sim. 272; [*Sollau v. De Held* (1851), 2 Sim. N. S. 133; 89 R. R. 245; *Mayor of Liverpool v. Chorley Waterworks Co.* (1852), 2 D. M. & G. 852; *Cook v. Mayor of Bath* (1868), L. R. 6 Eq. 177; *Fritz v. Hobson* (1880), L. R. 14 Ch. D. 542; and cases cited above, p. 452, note (z).

(c) (1724), 2 P. Wms. 266.

(d) [Cf. *Tipping v. Eckersley* (1855), 2 K. & J. 264; *Phillips v. Treeby* (1862), 8 Jur. N. S. 711, 999; 3 Giff. 632; *Smart v. Jones* (1864), 33 L. J. N. S. C. P. 154; *Nuneaton Local Board v. General Sewage Co.* (1876), L. R. 20 Eq. 127.]

[In the case of light, the views of the judges as to what constitutes an injury so substantial as to call for an injunction has varied considerably.

Remedy by injunction.

Injury must be substantial.  
General rule.

But the rule is now clearly established, that the Court will restrain by injunction, not indeed a trifling or immaterial interference with the legal right to light, but any obstruction which is calculated to render the dominant tenement, wherever situate, substantially less fit either for comfortable use and enjoyment as a dwelling-house or for beneficial use and occupation as a place of business of any kind (e).

"I cannot myself," said Vice-Chancellor Wood in *Dent v. Auction Mart Co.* (f), "arrive at any other conclusion than this: that where substantial damages would be given at law, as distinguished from some small sum of £5, £10, or £20, this Court will interpose; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour have a right to purchase him out without any Act of Parliament for that purpose having been obtained."

Where the light obstructed is lateral light, it naturally requires more evidence to prove a material injury than when the light is direct (g).

In the case of the pollution of a stream, the injunction is granted because the injury is continuous, though the damage recoverable may be merely nominal (h).]

Recurring or continuing injury.

Where the injury is of a temporary [or trivial] nature only, the Court will not interfere by injunction (i); [but a temporary

Temporary or trivial injury.

(e) Above, p. 571.

(f) (1866), L. R. 2 Eq. at p. 246; approved by Jessel, M. R., in *Aynsley v. Glover* (1874), L. R. 18 Eq. at p. 552.

(g) *Clarke v. Clark* (1865), L. R. 1 Ch. 16; *City of London Brewery Co. v. Tenant* (1873), L. R. 9 Ch. 212.

(h) *Clowes v. North Staffordshire Potteries Waterworks Co.* (1872), L. R. 8 Ch. 125, 142; *Pennington v. Brinsop Hall Coal Co.* (1877), 25 W. R. 874.

(i) *Coulson v. White* (1743), 3 Atk. 21; [*Att.-Gen. v. Sheffield Gas Consumers' Co.* (1853), 3 D. M. & G. 304; *Suaine v. Great Northern Rail. Co.* (1864), 10 Jur. N. S. 191; *Durell v. Pritchard* (1865), L. R. 1 Ch. 244; *Cooke v. Forbes* (1867), L. R. 5 Eq. 166; *Att.-Gen. v. Cambridge Consumers' Gas Co.* (1868), L. R. 4 Ch. 71; *Llandudno Urban District Council v. Woods*, [1893] 2 Ch. 705; *Behrens v. Richards*, [1905] 2 Ch. 614. "Where,"

said Wood, L. J., in *Att.-Gen. v. Cambridge Consumers' Gas Co.*, "the Court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two grounds, which are of a totally distinct character: one is that the injury is irreparable, as in the case of cutting down trees; the other, that the injury is continuous, and so continuous that the Court acts upon the same principle as it used in older times with reference to bills of peace, and restrains the repeated acts which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable. As an illustration of this class of case I may refer to *Soltau v. De Held* (2 Sim. N. S. 133; 89 R. R. 245), where the annoyance from the ringing of the bell was in itself slight, but it was so continuous that the Court thought fit to

Remedy by  
injunction.

Temporary  
injury.

Plaintiff's  
interest.

[interference which may have permanent effects on the value of an estate will of course be restrained (*k*).

In *Dent v. Auction Mart Co. (l)*, Wood, V.-C., says: "I may suggest a case in which the Court would probably not interfere (not merely where the right is of short duration, for I have interfered in cases of very short duration with reference to the obstruction of light), but where the whole of the property is about to cease immediately, as, for instance, in the case of notice given under a railway Act to take a house, when the house is about to be destroyed and razed to the ground in two or three days' time. That is one of the cases in which damages might be given at law, and yet this Court would not think it right to interfere."

An injunction to restrain an obstruction to light has been granted at the suit of a yearly tenant (*m*), and of a tenant whose lease had expired after the obstruction, but who had agreed to renew (*n*); and in *Jones v. Chappell (o)*, Jessel, M. R., said that, so far as he was aware, it had never been decided that a weekly tenant could not have an injunction, and if a weekly tenant and his landlord were to join in a suit to restrain a nuisance, he would not find the slightest difficulty in granting an injunction. In *Jacomb v. Knight (p)*, where a yearly tenant filed a bill against adjoining tenants holding under the same landlord to restrain a slight obstruction to light, and the landlord after the filing of the bill gave the plaintiff notice to quit, so that at the time of the hearing less than eight months of the tenancy remained unexpired, Romilly, M. R., granted a mandatory injunction; but the Lords Justices, on appeal, taking into consideration the extent of the plaintiff's interest, and the balance of convenience and inconvenience, dismissed the bill without costs, and without prejudice to an action for damages. This is probably a case in which the Court would now, if substantial injury were shown, award damages in lieu of an injunction (*q*).

The owner of a house, who has no intention of residing there, may have an injunction against an obstruction to the windows,

arrest the nuisance *brevi manu*, and save the complainant all further annoyance'').

(*k*) *Goldamid v. Tunbridge Wells Commissioners* (1866), L. R. 1 Ch. 349, 354.

(*l*) (1866), L. R. 2 Eq. at p. 247.

(*m*) *Simper v. Foley* (1862), 2 J. & H. 555; cf. *Inchbald v. Robinson* (1869), L. R. 4 Ch. 388.

(*n*) *Gale v. Abbot* (1862), 8 Jur. N. S. 987.

(*o*) (1875), L. R. 20 Eq. 539.

(*p*) (1863), 32 L. J. (N. S.) Ch. 601; 11 W. R. 812; 8 L. T. Rep. N. S. 621.

(*q*) See below, p. 609. As to the persons against whom an injunction will be granted, see above, p. 588.

[simply on the ground of the effect of such an obstruction on the value of the property (r).

Remedy by injunction.

The order in *Yates v. Jack* (s), which was until recently followed in cases of light where the injury arises in the course of rebuilding the servient tenement, restrained the defendant "from erecting any building so as to darken, injure or obstruct any of the ancient lights of the plaintiffs as the same were enjoyed previously to the taking down by the defendant of his buildings on the opposite side of the street, and also from permitting to remain any buildings already erected which would cause any such obstruction." Lord Cranworth in the same case, following *Stokes v. City Offices Company* (t), added a proviso enabling the parties to come before the chief clerk in order to have it ascertained whether any proposed addition to the building would or would not be a violation of the injunction; but this proviso was not inserted as a matter of course (u) in subsequent orders.

Order in  
*Yates v. Jack.*

Since it was definitely laid down in *Colls v. Home and Colonial Stores, Ltd.* (x), that the easement of light confers only the "right to be protected against a particular form of nuisance," and not the right to the whole of the light as it was previously enjoyed, the form of the order in *Yates v. Jack* is not appropriate as it stood. It was disapproved as a common form order in *Colls' Case* (y), and suggestions for an alteration in the form of order were made by Lord Macnaghten. "The common form of order which has been in use since the case of *Yates v. Jack* is not, I think, altogether free from objection. I think it would be better that the order, when expressed in general terms, should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows, as the same existed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. If the action is brought to a hearing before the defendant's new buildings are completed, and there seems to be good ground for the plaintiff's apprehensions, an order, I think, might be conveniently made in that form with costs up to the hearing, and

Order in  
*Yates v. Jack*  
not now  
suitable.

(r) *Wilson v. Townsend* (1860), 1 Dr. & Sm. 324; cf. *Goldsmid v. Tunbridge Wells Improvement Commissioners* (1866), L. R. 1 Ch. at p. 355. As to a reversioner, see p. 582, above.

(s) (1866), L. R. 1 Ch. at p. 298; see the order given in full in Seton's Decrees, 6th edit. p. 565.

(t) (1865), 11 Jur. N. S. 560; 2 H. & M. 650.

(u) Seton, *ubi sup.*

(x) [1904] A. C. 179.

(y) Per Lord Macnaghten, at p. 193; per Lord Davey, at p. 201; per Lord Lindley, at p. 207.

Remedy by  
injunction.

Order in  
*Yates v. Jack*  
not now  
suitable.

[liberty to the plaintiff within a fixed time after completion to apply for further relief by way of mandatory injunction or damages, as he may be advised.]”

In *Anderson v. Francis* (z), Swinfen Eady, J., following the above suggestions of Lord Macnaghten, granted an injunction restraining the defendants from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiffs’ ancient windows as the same existed previously to the commencement of the alterations in the defendants’ buildings. The defendants were ordered to pay the costs of the action up to and including the hearing, and liberty was given to the plaintiffs to apply, not later than three calendar months after receiving notice from the defendants that their new building had been completed, for further relief by way of mandatory injunction or damages, as they might be advised; and the order in the form suggested by Lord Macnaghten has now been adopted as the common form order (a).

Air.

It is improper to couple together “light and air” in every case; an injunction to protect air is not granted unless a separate case be made for it (b).

Reference to  
experts.

There are cases (c) where the Court, after deciding that there is an obstruction to be restrained, has, by consent of the parties, referred it to a surveyor to say what alteration will be sufficient to remedy the obstruction.

In *Abbott v. Holloway* (d), an order was by consent made to refer it to an independent surveyor to determine whether the erection of the defendants’ buildings, having regard to the increased height thereof, would depreciate to any and what extent the value of the plaintiffs’ premises; the defendants to pay to the plaintiffs the sum (if any) so determined; the surveyor to be agreed upon by the parties, or in default to be appointed by the judge, and his fees to be borne by the parties equally; the defendants to pay the plaintiffs’ taxed costs of the action; the surveyor not to be attended by anyone on behalf of the parties, or to take evidence.

It is not the practice of the Court on interlocutory motion to appoint an expert to report to the Court at the trial of the action (e).

(z) (1906), W. N. 160.

(a) See the orders made in *Higgins v. Belts*, [1905] 2 Ch. 217; *Andrews v. Waite*, [1907] 2 Ch. 500, 510.

(b) See Lord Selborne’s observations in *City of London Brewery Co. v. Tennant* (1873), L. R. 9 Ch. at p. 220; *Baxter v. Bower* (1876), 44 L. J. Ch. 625; 23 W. R. 805; and *Cable v. Bryant*, [1908] 1 Ch.

259.

(c) *Jessel v. Chaplin* (1866), 2 Jur. N. S. 931; *Att.-Gen. v. Merthyr Tydfil Local Board* (1870), 5 Weekly Notes, 148; but see *Att.-Gen. v. Colney Hatch* (1868), L. R. 4 Ch. 146.

(d) (1904), W. N. 124.

(e) *Baltic Co. v. Simpson* (1876), 24 W. R. 390. where Jessel, M. R., pointed

[But in *Colls v. Home and Colonial Stores, Ltd.* (f), Lord Macnaghten made the following observations (g) :—"It will be observed that in *Back v. Stacey* (h), the learned judge told the jury who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient light had undergone. Now a judge who exercises the functions of both judge and jury cannot be expected to view the premises himself, even if he considers himself an expert in such matters. But I have often wondered why the Court does not more frequently avail itself of the power of calling in a competent adviser to report to the Court upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in Court if required. I am not in the least surprised that the plaintiffs in the present case objected to a report from a disinterested surveyor, but in my opinion the Court ought to have obtained such a report for its own guidance."

Remedy by injunction.

Reference to experts.

It is doubtful whether a judge should himself visit the premises in question and use his own senses to ascertain whether an injury has been committed; for he may be mistaken, and it is his duty to decide on sworn evidence (i).

Inspection by judge.

The question, whether the Court of Chancery will interfere interlocutorily by injunction before the plaintiff's right is decided one way or the other by a trial, is one depending upon the discretion of the Court, having regard to all the circumstances, including the clearness, extent and amount of the plaintiff's right, the injury which he is likely to sustain, his promptness in complaining, and a comparison of the injury likely to result to the plaintiff or defendant respectively, in case the ultimate issue should

Interlocutory injunction.

out that in *Kelk v. Pearson* (1871), L. R. 6 Ch. 809, the motion was treated as the hearing, and said that this was probably so in *Cartwright v. Last* (1876), Seton's Decrees, ed. 6, p. 567; W. N. 1876, p. 60. The order in the last-mentioned case was made upon motion, but concluded: "and it is ordered that the further hearing of the said motion do stand over until after such report as aforesaid shall have been made, when any of the parties are to be at liberty to apply to have this action disposed of, and at such further hearing of the said

motion, or hearing of the said action, both parties are to be at liberty to examine the said referee *vivâ voce*." See, however, *Leech v. Schweder* (1874), L. R. 9 Ch. 463.

(f) [1904] A. C. 179.

(g) Ibid. p. 192.

(h) (1826), 2 C. & P. 465; 31 R. R. 679.

(i) *Jackson v. Duke of Newcastle* (1864), 3 De G. J. & S. 275; 10 Jur. N. S. 688; *Leech v. Schweder* (1874), 22 W. R. 292; 43 L. J. Ch. 232.



Remedy by  
injunction.  
Interlocutory  
injunction.

[be in his favour, by reason of the refusal or the granting of the injunction, as the case may be (*k*). And the provision in the Judicature Act, 1873 (*l*), which empowers the High Court of Justice to grant an interlocutory injunction "in all cases in which it shall appear to the Court to be just or convenient that such order should be made," is not intended to disturb the settled principles on which injunctions were formerly granted or refused (*m*). It is as to this class of injunctions that the learned author observed that,] as a general rule, Courts of Equity will interfere by injunction in those cases of disturbance of easements only where the right of the party complaining is clearly established, and the injury which he must necessarily sustain, if the work be allowed to proceed, is of such a nature that no adequate compensation can be afforded by damages only, and "where delay itself would be a wrong" (*n*).

"The leading principle," said Lord Brougham in *Blakemore v. Glamorganshire Canal Navigation* (*o*), "on which I proceed in dealing with this application,—the principle which, I humbly conceive, ought, generally speaking, to be the guide of the Court and to limit its discretion in granting injunctions, at least where no special circumstances occur,—is, that such a restraint shall be imposed as may suffice to stop the mischief complained of, and, where it is to stay injury, to keep things as they are for the present."

[It is no longer necessary, in order that an interlocutory injunction may be obtained, that the evidence of right shall be conclusive; but a *prima facie* case must be made out, and the Court must be satisfied that there is a question to be tried at the hearing (*p*).

Undertaking  
as to damages.

Where the plaintiff obtains an interlocutory injunction, an undertaking by him to abide by any order which the Court may make as to damages, in case the Court should afterwards be of opinion that the defendants have sustained any, by reason of the order,

(*k*) See 2 Daniell, Chancery Practice, 7th edit. 1360.

(*l*) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(*m*) See *Beddow v. Beddow* (1878), L. R. 9 Ch. D. 89; *Day v. Brounrigg* (1873), L. R. 10 Ch. Div. at p. 37, per James, L. J.; *Gaskin v. Balls* (1879), L. R. 13 Ch. Div. 324; *Fletcher v. Rodgers* (1878), 27 W. R. 97. And cf. *North London Rail. Co. v. Great Northern Rail. Co.* (1883), L. R. 11 Q. B. Div. 30.

(*n*) Per Sir T. Plumer, M. R., in *Wynstanley v. Lee* (1818), 2 Lev. 332; [cf. *Mogul Steamship Co. v. McGregor, Gow & Co.* (1885), L. R. 15 Q. B. D. 476].

(*o*) (1832), 1 My. & Kee. 185; 36 R. R. 289, Preface vi.

(*p*) *Preston v. Luck* (1844), L. R. 27 Ch. Div. at p. 506, per Cotton, L. J.; *Challender v. Royle* (1887), L. R. 38 Ch. Div. 425.

[which the plaintiff ought to pay, is inserted in the order as a matter of course (*q*); and where an interlocutory injunction has been granted on such an undertaking, and it is afterwards held at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, even though the plaintiff obtained the order without any misrepresentation, concealment, or default (*r*).]

Remedy by injunction.

Undertaking as to damages.

In some cases the Court has ordered a motion for an interim injunction to stand over until the trial, on the defendant undertaking to abide by any order which may be made at the trial as to pulling down the additional buildings to be erected (*s*); but no such undertaking is required in order to found the jurisdiction of the Court over buildings erected after the commencement of the action (*t*).]

Undertaking to pull down.

A distinction has been taken in some cases between those injunctions which merely prevent the doing of an act, and those the consequence of which, either directly or indirectly, will be to compel a party to do some act, as to fill up a ditch (*u*), or pull down a wall (*x*); the former being granted on motion, the latter [formerly] on decree only.

Mandatory injunction.

This distinction, however, though recognized, does not appear to have been strictly attended to: indeed, in one case (*y*), Lord Eldon, though he refused the order, as prayed, "to restrain the defendant from continuing to keep certain roads out of repair," purposely made an order in such a form as to have the same effect, by making it difficult for the defendant to avoid completely repairing his works. "I take leave," said Lord Brougham, in commenting on this case, in his judgment in *Blake-more v. Glamorganshire Canal Navigation* (*z*), "to agree with Lord Lyndhurst in the opinion that, if this Court has this jurisdiction, it would be better to exercise it directly and at once; and I will

(*q*) *Chappell v. Davidson* (1856), 8 D. M. & G. 1; *Graham v. Campbell* (1878), L. R. 7 Ch. Div. 490.

(*r*) *Griffith v. Blake* (1884), L. R. 27 Ch. Div. 474, where the Lords Justices dissented from an opinion to the contrary expressed by Jessel, M. R., in *Smith v. Day* (1882), L. R. 21 Ch. Div. 421.

(*s*) *Wilson v. Townsend* (1860), 1 Dr. & Sm. 324.

(*t*) *Smith v. Day* (1880), L. R. 13 Ch. Div. 651; cf. *Aynsley v. Glover* (1874), L. R. 18 Eq. 544, at p. 553, per Jessel, M. R.; *Mackey v. Scottish Widows' Fund*

(1876), I. R. 10 Eq. 113; 24 W. R. Dig. 96; *Greenwood v. Hornsey* (1886), L. R. 33 Ch. D. 471.

(*u*) *Robinson v. Lord Byron* (1785), 1 Bro. C. C. 588.

(*x*) *Ryder v. Bentham* (1750), 1 Ves. sen. 513.

(*y*) *Lane v. Newdigate* (1804), 10 Ves. 192; 7 R. R. 381.

(*z*) (1832), 1 My. & Kee. 184; 36 R. R. 289, Preface vi.; [cf. the observations of Jessel, M. R., in *Smith v. Smith* (1875), L. R. 20 Eq. at p. 504; and *Bidwell v. Holden* (1890), 63 L. T. 104.]

Remedy by injunction.	further take leave to add, that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt on the jurisdiction." The question of jurisdiction his Lordship does not expressly decide; "although," he continues, "we have no right to say there is not a precedent for taking a similar course here, yet surely we may pause, and, without denying the jurisdiction, decline to exercise it."
Mandatory injunction.	
Present form of mandatory injunction.	[The Court has now departed from the "roundabout mode," and where an injunction is granted, the effect of which is to require the performance of a certain act, such as the pulling down and removal of buildings, the order is made in a direct mandatory form, and not in the indirect form hitherto in use (a).]
Mandatory injunction granted on motion.	The jurisdiction to grant a mandatory injunction, even on interlocutory motion, has, in recent years, often been asserted. And—although the jurisdiction has not been exercised on motion except in grave and urgent cases (b), or when the defendant has endeavoured to anticipate the action of the Court by hurrying on his building after litigation has commenced (c),—it seems that, but for the statute to be hereafter referred to, the Court would feel bound, on the hearing of a suit where no acquiescence (d) was shown, to order the demolition of buildings erected in defiance of a legal right and to the grave and serious injury of the person entitled to such right (e),—and that, whether the buildings were or were not completed before action brought (f). To refuse a mandatory injunction in such a case would have been to enable a servient owner, by the exercise of diligence or contrivance, to buy out the dominant owner against his will.
Lord Cairns' Act.	By the statute (g) commonly called Lord Cairns' Act, it was enacted as follows:—

(a) *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438; Seton on Decrees, 6th edit. p. 565.

(b) *Earl of Mexborough v. Bower* (1843), 7 Beav. 127; 64 R. R. 34; *Hervey v. Smith* (1855), 1 K. & J. 389; *Westminster Brymbo Coal and Coke Co. v. Clayton* (1867), 39 L. J. Ch. 476; *Beadel v. Perry* (1866), L. R. 3 Eq. 465.

(c) *Daniel v. Ferguson*, [1891] 2 Ch. 27; *Von Joel v. Hornsey*, [1895] 2 Ch. 774. Cf. *Keeble v. Poole* (1898), 105 L. T. 474; 42 Sol. Jour. 791.

(d) Below, p. 611.

(e) See *Jacomb v. Knight* (1863), 9 Jur. N. S. 529; 82 L. J. N. S. Ch. 601; *London and North Western Rail. Co. v.*

*Lancashire and Yorkshire Rail. Co.* (1867), L. R. 4 Eq. 174; *Holmes v. Upton* (1840), L. R. 9 Ch. 214, n.; *Smith v. Smith* (1875), L. R. 20 Eq. at p. 504, per Jessel, M. R.; *Price v. Bala and Festiniog Rail. Co.* (1884), 50 L. T. Rep. 787; *Skid v. Godfrey, W. N.* (1893), p. 116. Cf. *Clifford v. Holt*, [1899] 1 Ch. 698.

(f) *Durell v. Pritchard* (1865), L. R. 1 Ch. 244; notwithstanding *Deers v. Guest* (1836), 1 Myl. & Cr. 516; *Lavence v. Austin* (1865), 11 Jur. N. S. 576; and *Curriers' Co. v. Corbett* (1865), 11 Jur. N. S. 719. See *City of London Brewery Co. v. Tennant* (1873), L. R. 9 Ch. 212.

(g) 21 & 22 Vict. c. 27, s. 2. This Act was in terms repealed by the Statute

[“In all cases in which the Court of Chancery (h) has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.”]

Remedy by injunction.

Lord Cairns' Act.

Upon this, it has been held that, unless a case is made for an injunction—i.e., if the injury complained of is so trifling that, even if the Act had not been passed, no injunction would have been granted (i), or if the plaintiff is disentitled by acquiescence from obtaining an injunction (k), the Court cannot under the Act award damages.

Does not apply unless case made for injunction.

But upon the further question, in what cases the Act does apply, the decisions have been somewhat conflicting. In former editions of this treatise the question was propounded whether, given a case in which the defendant is clearly in the wrong, and where an appreciable amount of damage, according to the principles above stated (l), will result to the plaintiff if the wrong be allowed to continue, but in which, on a comparison of this damage with the damage which an injunction will cause to the defendant, the latter greatly preponderates, the Court will look to the defendant's interest as well as to the plaintiff's, and allow the defendant to continue the injury on paying damages for his wrong. It was submitted that to answer this question in the affirmative would be to permit one of two neighbours to effect a compulsory purchase of the rights of the other—a power which is generally given only

In what cases applies.

Law Revision Act, 1883; but the jurisdiction created by the Act is not affected by the repeal (per Baggallay, L. J., in *Sayers v. Collyer* (1884), L. R. 28 Ch. Div. 103). See and consider *Frits v. Hobson* (1880), L. R. 14 Ch. D. 542; *Serrao v. Noel* (1885), L. R. 15 Q. B. D. 549; *Dodd v. Myers* (1884), 28 Sol. Jour. 772.

(h) Now the Chancery Division of the High Court of Justice.

(i) *Lawrence v. Austin* (1865), 11 Jur. N. S. 576; *Durrell v. Fritchard* (1865), L. R. 1 Ch. at p. 252; *Hindley v. Emery* (1865), L. R. 1 Eq. 52; *Aynsley v. Glover* (1874), L. R. 18 Eq. 544; *Lady Stanley of Alderley v. Earl of Shrewsbury*

(1875), L. R. 19 Eq. 616. See *City of London Brewery Co. v. Tennant* (1873), L. R. 9 Ch. 212. These decisions do not apply to the jurisdiction of the High Court, under the Judicature Acts, to award damages for past injury; but so far as the power of the Chancery Division to award damages in lieu of an injunction—i.e., damages for past and future loss—still survives, the decisions are still applicable. See *Kino v. Rudkin* (1877), L. R. 6 Ch. D. 160.

(k) *Smith v. Smith* (1875), L. R. 20 Eq. at p. 503, per Jessel, M. R. Cf. *Proctor v. Bayley* (1889), L. R. 42 Ch. Div. 390.

(l) Page 600.

Remedy by  
injunction.

Lord Cairns'  
Act.

[where it is for the public benefit; while to answer it in the negative would be to neutralize or greatly diminish the effect of the Act.

It seems that the answer to this question is in the negative in the case of prohibitory injunctions (*m*); in the case of mandatory injunctions it depends upon the conduct of the defendant, and whether the injury to the plaintiff is trivial and can be fairly compensated by money damages.

Defendant  
building with  
his eyes open  
not let off with  
damages.

Where the defendant has erected or substantially erected his building, either after action brought, or otherwise with notice of the plaintiff's right and in defiance of his protests, the judges have absolutely refused to allow him to compensate the plaintiff with damages, but have forced him to pull down his buildings (*n*).

Otherwise, no  
settled rule.

But, except for such cases of wilful breach of duty, the Courts have declined to fetter their discretion by laying down any absolute rule and have considered each case upon its own circumstances. The tendency of the earlier decisions (*o*) was to award damages in preference to a mandatory injunction whenever the injury to the plaintiff could be reasonably estimated in money—whenever, in fact, the injury was not “irreparable” except by the restoration of the status quo ante. But, more recently, the inclination of the judges appears to have been to exercise the discretion only in cases where the damage to the plaintiff, although not so trifling as to exclude the jurisdiction altogether, is yet small in amount and capable of being amply compensated by a money payment, and when there are special circumstances which would make it oppressive to grant an injunction (*p*).

(*m*) *Couper v. Laidler*, [1903] 2 Ch. 337.

(*n*) *Smith v. Smith* (1875), L. R. 20 Eq. 500; *Krehl v. Burrell* (1878), L. R. 7 Ch. D. 551; 11 Ch. Div. 146; *Gaskin v. Balls* (1879), L. R. 13 Ch. Div. 324; *Greenwood v. Hornsey* (1886), L. R. 33 Ch. D. 471; *Lawrence v. Horton* (1890), 59 L. J. Ch. 440; 62 L. T. 749; 38 W. R. 555; *Parker v. Stanley* (1902), 60 W. R. 282; and see note (*c*), p. 608.

(*o*) *Johnson v. Wyatt* (1863), 9 Jur. N. S. 1333; *Isenberg v. East India House Estate Co.* (1863), 10 Jur. N. S. 221; 33 L. J. N. S. Ch. 392; *Bowes v. Law* (1870), L. R. 9 Eq. 636; *Batt v. Earl of Derby* (1874), referred to by Jessel, M. R., at L. R. 18 Eq. p. 555, and by Kekewich, J., at 63 L. T. 381; *Lady Stanley of Alderley v. Earl of Shrewsbury* (1876),

L. R. 19 Eq. 616; *National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.* (1877), L. R. 6 Ch. D. 757; *Holland v. Worley* (1884), L. R. 26 Ch. D. 578.

(*p*) *Senior v. Pawson* (1866), L. R. 3 Eq. 330; *Aynsley v. Glover* (1874), L. R. 18 Eq. at p. 554; *Smith v. Smith* (1875), L. R. 20 Eq. 500; *Allen v. Ayres* (1884), W. N. p. 242; *Dicker v. Popham* (1890), 63 L. T. 379; *Martin v. Price*, [1894] 1 Ch. 276; *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; *Young v. Star Omnibus Co., Ltd.* (1902), 86 L. T. 41; *Couper v. Laidler*, [1903] 2 Ch. 337; *Colls v. Home and Colonial Stores, Ltd.*, [1904] A. C. 192 (per Lord Macnaghten), 212 (per Lord Lindley); *Kine v. Jolly*, [1906] 1 Ch. 480; *affd.* [1907] A. C. 1.

[It seems that damages might be awarded under the Act even for injury done after the issue of the writ (*q*), and possibly for injury which may be expected to accrue after judgment (*r*).]

Remedy by  
injunction.

Lord Cairns'  
Act.

In some cases, even though there has been no such acquiescence as to amount to a constructive grant of a right (*s*), the plaintiff may be barred by delay from obtaining a remedy by injunction (*t*).]

Injury after  
action  
brought.  
Laches.

(*q*) *Davenport v. Rylands* (1865), L. R. 1 Eq. 302; *Fritz v. Hobson* (1880), L. R. 14 Ch. D. 542.

(*r*) See *Dicker v. Popham*, ubi sup.

(*s*) As to which, see above, p. 65.

(*t*) *Wicks v. Hunt* (1869), Johns. 372;

*Cooper v. Hubbuck* (1860), 30 Beav. 160; *Gaskin v. Balls* (1879), L. R. 13 Ch. Div. 324; *Young v. Star Omnibus Co., Ltd.*, ubi sup. But see *Hogg v. Scott* (1874), L. R. 18 Eq. 444, and the cases there cited.



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THE END.

*Ex. J. M.*  
10/13/08















